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The Right to Democracy in the Age of Global Constitutionalism





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For my inspiring Mother; without her I would not be here.

Abstract

This thesis aims to resolve the puzzling standing of democracy in international law. To date, international lawyers have been caught between the exceedingly careful approach, by either resisting to the notion of democracy as a legal concept *tout court* or acknowledging that only the electoral dimension of democracy, that is the right to free and fair elections, is a positive legal right, and the exceedingly maximalist approach, according to which democracy, equated with all sorts of social virtues of a liberal society, is a human right and a state obligation. Both accounts suffer from a lack of a clear methodological reflection and thus fail upon deeper theoretical scrutiny. This thesis sets out to respond to these shortcomings by developing a contextualised (context-aware) approach to democracy but within the proper confines of the *de lege lata* legal discourse. That said, global constitutionalism as a political theory and a legal approach providing the most adequate account of transformative nature and potential of international law serves as a theoretical framework for the present thesis. On this account, because (empirically validated) constitutionalisation of international law entails the law's increasing autonomisation vis-à-vis states, non-consensual elements within international law, such as teleological and evolutive treaty interpretation, evolving nature of custom towards one accommodating interests of states as members of the international community, softening of international legal obligation, the ever-growing impact of equitable general principles and the reinvigorated role of legitimacy in the legal discourse, provide an important source of the democratic entitlement's legal underpinnings.

Beyond this complex theoretical construction, it is shown that not only is the right to democracy an abstract academic invention fostered by the constitutional rationale, but it is also actively defended both by the international community (external defence) and domestic actors (internal defence). Whereas the external mechanism of democracy promotion and defence is marked by the elevated willingness of the international community to intervene in response to democratic disruptions and backsliding, such as *coups d'état*, the internal mechanism is triggered by the bottom-up resistance by means of revolution as an *ultima ratio* tool to restore democracy and an ultimate remedy to effectuate the right to democratic governance. It is concluded that international law recognises the right to democratic governance and provides for the external and internal mechanisms of its defence and enforcement. Certainly, this does not signify an end to the contestation over the substantive scope of democracy and the concrete parameters of its legal status. However, this does suggest that the preceding black and white discussions on democracy are clearly insufficient for understanding the operation of this multifaceted concept and its impact on international relations. This work has taken a step forward to add shade and texture to the rigid and monochrome view on democracy of the previous years.

Sammanfattning

Den här avhandlingen strävar till att klargöra demokratins förbryllande ställning i folkrätten. Fram till nu har folkrättare ställts mellan en överdrivet försiktig inställning, där de antingen utan vidare förkastar demokratibegreppet som ett juridiskt koncept eller betraktar enbart valdimensionen, det vill säga rätten till fria och rättvisa val, som en positiv rättighet och en överdrivet maximalistisk inställning enligt vilken demokrati, som likställs med en mängd olika dygder i det liberala samhället, är en mänsklig rättighet och en statlig skyldighet. Båda förklaringarna lider av en brist på metodologisk reflektion och fallerar vid en närmare teoretisk granskning. Denna avhandling tar sig an att svara på dessa tillkortakommanden genom att utveckla en kontextuell (kontextmedveten) inställning till demokrati inom ramen för en juridisk diskussion *de lege lata*. Global konstitutionalism som politisk teori och rättligt synsätt tillhandahåller dock den mest adekvata förklaringen av folkrättens transformativa karaktär och potential och fungerar som teoretisk ram för den här avhandlingen. Av detta skäl, eftersom (empiriskt validerad) konstitutionalism i folkrätten innebär växande autonomi för lagen gentemot staterna, tillhandahåller de icke-konsensuella elementen i folkrätten, såsom teleologisk och dynamisk tolkning av fördrag, sedvanerättens tendens att utvecklas på ett sätt som tillgodoser staternas intressen som medlemmar i det internationella samfundet, uppluckring av internationella rättsliga förpliktelser, ett alltmer växande inflytande från rättvisa allmänna principer och en återupptagen roll för legitimitet i den rättsliga diskursen, en viktig källa till den rättsliga grunden för rätten till demokrati.

Bortom denna komplexa teoretiska konstruktion visar avhandlingen att rätten till demokrati inte bara är en abstrakt akademisk konstruktion som grundas på ett konstitutionellt resonemang utan också att den aktivt försvaras både av det internationella samfundet (externt försvar) och nationella aktörer (internt försvar). Medan den externa mekanismen som främjar och försvarar demokrati markeras av det internationella samfundets ökande beredskap att intervensera när demokratin störs eller tar ett steg bakåt, såsom vid statskupper, initieras den interna mekanismen av motstånd på gräsrotsnivå i form av revolutioner som ett sista medel för att återställa demokrati och som ett slutligt rättsmedel för att genomföra rätten till demokrati. Slutsatsen är att folkrätten erkänner rätten till demokratiskt styre och tillhandahåller externa och interna mekanismer för att försvara och genomtvinga den. Detta innebär visserligen inte ett slut på ifrågasättandet av demokratins innehållsmässiga omfattning och de konkreta parametrarna för dess rättsliga status. Det tyder dock på att de tidigare nämna svartvita diskussionerna av demokrati är klart otillräckliga för att förstå hur detta mångfacetterade koncept fungerar och vilken inverkan det har på internationella relationer. Detta arbete utgör ett steg framåt i strävan att

Sammanfattning

ge nyanser och textur åt den stela och monokroma synen på demokrati under tidigare år.¹

¹ I am greatly indebted to my colleague and friend Dr Lisa Grans for making a Swedish translation of the abstract.

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List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACmHPR	African Commission on Human and Peoples' Rights
ANC	African National Congress
ASEAN	Association of South-East Asian Nations
AU	African Union
AUCA	Constitutive Act of the African Union
CCIT	Comprehensive Convention against International Terrorism
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CJEU	Court of Justice of the EU
CMAG	Commonwealth Ministerial Action Group
CoE	Council of Europe
CRPD	Convention on the Rights of Persons with Disabilities
CSCE	Conference on Security and Cooperation in Europe
CSRD	<i>Conseil suprême de restauration de la démocratie</i>
DCFTA	Deep and Comprehensive Free Trade Agreement
ECHR	European Convention on Human Rights
ECHR-P6	Protocol 6 to the European Convention on Human Rights
ECJ	European Court of Justice
ECmHR	European Commission of Human Rights
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EU	European Union
FIS	Islamic Salvation Front
HRC	Human Rights Committee
IACmHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IADC	Inter-American Democratic Charter
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on Elimination of All Forms of Racial Discrimination
ICESCR	International Convention on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law

List of Abbreviations

IHRL	International Human Rights Law
IIC	Independent International Commission on Kosovo
ILA	International Law Association
ILC	International Law Commission
IMF	International Monetary Fund
IPU	Inter-Parliamentary Union
IR	International Relations
ISIS	Islamic State of Iraq and Syria
JWT	Just War Theory
NATO	North Atlantic Treaty Organisation
NTC	National Transitional Council of Libya
OAS	Organisation of American States
OAU	Organisation for African Unity
OIC	Organisation of Islamic Cooperation
ONUVEH	United Nations Observer Group for the Verification of the Elections in Haiti
ONUEN	United Nations Mission for Verification of Electoral Process in Nicaragua
OSCE	Organisation for Security and Cooperation in Europe
PLO	Palestine Liberation Organisation
PCIJ	Permanent Court of International Justice
PSC	Peace and Security Council
R2P	Responsibility to Protect
SAARC	South Asian Association of Regional Cooperation
SFRY	Socialist Federal Republic of Yugoslavia
SOC	Syrian Opposition Coalition
STL	Special Tribunal for Lebanon
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UNMIK	United Nations Mission in Kosovo
UNSC	United Nations Security Council
UNTAC	United Nations Transitional Authority in Cambodia
UNTAET	United Nations Transitional Administration in East Timor
UNTAG	United Nations Transitional Assistance Group
UPD	Unit for the Promotion of Democracy
VCLT	Vienna Convention on the Law of Treaties
WWII	Second World War

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1. Introduction: Setting the Scene

Before the Cold War, references to the notion of democracy in the writings of international lawyers were meagre. The mainstream view succinctly expressed by the American Law Institute that ‘international law does not generally address domestic constitutional issues, such as how a national government is formed’¹ was a generally accepted dogma. Regardless of the enshrinement of a bunch of civil and political rights and freedoms, including the right to political participation and the freedoms of assembly, opinion and expression, in legal instruments of global reach, such as the Universal Declaration of Human Rights (UDHR) and the 1966 Human Rights Covenants, the heterogeneity of member states’ political regimes had hindered the emergence of an unequivocal interpretation of the concept of democracy. Moreover, recognition practices of states and international organisations based on pragmatic considerations of ‘effective control’ would have been frustrated should democracy have asserted itself as a universal legal principle, not to say, a globally enforceable human right.

Following the fall of communism, however, and the subsequent emergence of new states, the international community turned out to be more amenable to an idea that international law should take a more rigorous stance towards how states are internally constructed and what level of protection they give to their citizens.² To illustrate, the proportion of (electoral) democracies has increased sharply, and as of the end of 2018, approximately 116 nations are legally committed to permit open, multiparty, secret-ballot elections with a universal franchise.³ Leading international and regional organisations have reaffirmed the right to political participation, including the UN General Assembly (UNGA), the ICCPR Human Rights Committee, regional judicial and quasi-judicial bodies, such as the European Court of Human Rights and the American Commission on Human Rights, and their umbrella organisations, namely the Council of Europe and the Organisation of American States respectively, not to mention the collective defence mechanisms within the Organisation for Security and Cooperation in Europe and the African Union. Democracy and human rights are now requirements for admission of new member states into the European Union and a number of other regional organisations. The UN too is now explicitly pro-democratic and together with its regional counterparts is becoming actively involved in the crafting and monitoring of elections in

¹ *Restatement, Third, of the Foreign Relations Law of the United States* (American Law Institute 1987) para 203.

² See eg Jure Vidmar, *Democratic Statehood in International Law* (Hart Publishing 2013) 1.

³ Freedom House, ‘Freedom in the World 2018’, Annual Report <<https://freedomhouse.org/report/freedom-world-2018-table-country-scores>> accessed 28 November 2018.

various countries across the globe.⁴ Other devices used by international fora to foster democratisation include the withholding of development assistance to states unwilling to pursue democratic reforms⁵ as well as the promotion of democratic practices through peace-building operations⁶ and, in extreme cases, through the use of force.⁷ The most recent cases of global promotion of democracy include international support of the grass-root revolutions against authoritarian regimes in the Arab world and Ukraine as ultimate means to uphold peoples' democratic aspirations. On top of this, the internationalisation of democracy is reinforced by the recent proclamation by the UNGA of an International Day of Democracy on 15 September.⁸ All in all, democracy, as two prominent commentators in this area have concluded, 'has become a central issue of international law, visualised by the continuous and continuing adoption of treaties, declarations, resolutions and other policy instruments'.⁹

This post-Cold War international legal landscape induced many international legal scholars to characterise democracy as a legal principle, customary norm and even a human right. In this way, the mutual interdependence between democracy and human rights was recognised¹⁰ as well as the perennial antagonism between the 'liberty of ancients' (public rights, or positive liberty) and the 'liberty of moderns' (individual rights, or negative liberty) was reconciled.¹¹ The debate about democracy has come to

⁴ See generally Yves Biegebder, *International Monitoring of Plebiscites and National Elections* (Kluwer Academic Publishers 1994).

⁵ See Stephen Haggard and Steven B Webb, *Voting for Reform: Democracy, Political Liberalization and Economic Adjustment* (OUP 1994); Barbara Brandtner and Allan Rosas, 'Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice' (1998) 9 EJIL 468, 473-77.

⁶ Russell Buchan, *International Law and the Construction of the Liberal Peace* (Hart Publishing 2013) 154-59.

⁷ See *inter alia* Anthony D'Amato, 'The Invasion of Panama Was a Lawful Response to Tyranny' (1990) 84 AJIL 516; Michael W Reisman, 'Humanitarian Intervention and Fledgling Democracies' (1995) 18 Fordham Int'l L J 794; Fernando R Teson, 'Collective Humanitarian Intervention' (1996) 17 Mich J Int'l L 323; Fernando R Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (Transnational Publishers 1997); Michael W Reisman, 'Sovereignty and Human Rights in Contemporary International Law' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 239-58; Fernando R Teson, 'The Liberal Case for Humanitarian Intervention' in JL Holzgrefe and Robert O Keohane (eds), *Humanitarian Intervention* (CUP 2003) 93-129.

⁸ UNGA Res 62/7 (8 November 2007) UN Doc A/RES/62/7, para 6.

⁹ Frithjof Ehm and Christian Walter (eds), *International Democracy Documents: A Compilation of Treaties and Other Instruments* (Brill/Nijhoff 2015) 1.

¹⁰ See eg David Beetham, *Democracy and Human Rights* (Polity 1999). See also Vienna Declaration and Programme of Action, World Conference on Human Rights (25 June 1993) para 8 ('Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives').

¹¹ See Jurgen Habermas, *Between Facts and Norms* (MIT Press 1995) 100-04 (The author employs the terms 'public autonomy' and 'private autonomy' and claims to resolve a contradiction between them). For the discussion on two liberties, see Wilfred Nippel, *Ancient and Modern Democracy: Two Concepts of Liberty?* (CUP 2016) 204-11, 348-50.

camouflage a debate about the constant progressing of the international community from the anarchical Westphalian society of self-interested Leviathans to a global community of peace-loving states respecting human rights of their citizens on the internal plane and living up to their international obligations on the external plane. Yet, the arguments set forth are incomplete and suffer from theoretical incongruences and real-world disconnect. The attempt by some scholars to foster a ‘novel right’ within the framework of traditional doctrine has almost always led to a conclusion that democracy is somewhat a right but yet not fully operational; by adjoining the qualifier ‘emerging’ to democracy one would appear as progressive but without endangering one’s positivist identity. However, the status of the concept of ‘emerging right’ in international legal doctrine is rather dubious and involves complex debates as to the theoretical soundness and legal implications of such construction. On top of this, the geopolitical developments of the last eight years including political violence and civil wars of the Arab Spring and the resultant establishment of ISIS (known as Islamic State of Iraq and Syria), a terrorist organisation exercising a *de facto* control over large portions of the land mass of Iraq and Syria, as well as Ukrainian political crisis of 2014 culminating in the Russian annexation of Crimea and its support of the ongoing civil war in eastern Ukraine, not to mention the rise of political extremism in Europe, the recent wave of military coups in Egypt and Turkey and the crisis of democratic values caused by Brexit and American isolationist politics, put the idea of democracy as a global right under ever more strain. On the contrary, to give up the idea of democratic entitlement is to betray the very project of human rights, since respect for human rights implies the existence of democratic institutions. It follows that a new framework is needed to make sense of international law in the twenty-first century and to ensure its effectiveness vis-a-vis new demands of the globalised society, one of these being democracy. This work sets out to account for the above-mentioned shortcomings and concerns in the debate on democracy by fleshing out a fresh look on international law’s theoretical foundations.

The objective of this thesis is thus to critically investigate an argument for the human right to democracy from the vantage point of global constitutionalism. Because the right to democracy is progressively gaining prominence in international legal debate by virtue of its universal endorsement in a variety of international instruments and enhanced interest within academic circles since the 1990s, it is undoubtedly a universal principle, ideal and ethical imperative.¹² Yet, it is still ‘invisible’, or, to put more precisely, not worth of

¹² See eg UNGA, Vienna Declaration and Programme of Action (12 July 1993) UN Doc A/CONF.157/23 preamble (Referring to democracy as a principle of the UN Charter); Inter-Parliamentary Union, Universal Declaration on Democracy (Cairo, 16 December 1997) para 3 <<http://www.ipu.org/cnl-e/161-dem.htm>> accessed 24 August 2016 (Defining democracy as an ‘ideal’); UNGA, ‘Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels’, UNGA Res A/RES/67/1 (30 November 2012) para 5 (‘We reaffirm that human rights, the rule of law and democracy are interlinked and

being paid attention to, from the standpoint of the value-neutral traditional legal doctrine, because no international legal treaty explicitly recognises the obligation to introduce and maintain democratic form of government, and state practice and *opinio juris* on the issue are too inconsistent and at times outright contradictory for a customary norm to be established. A new approach capable of remedying this positivistic straitjacket is thus needed. Global constitutionalism is a modern legal approach in international law seeking to map, identify and explain the ongoing developments within and of international law that deviate from the conventional Westphalian paradigm. At the core of the constitutional argument lies the idea that global values endorsed in the universally ratified instruments transcend the sum of individual state interests. These values include the rule of law, human rights and democracy. Certainly, such value-embeddedness of global constitutionalism raises concerns on many fronts since akin to other scholarly attempts to reconceptualise international law along neoliberal lines it propagates certain range of substantive values to the disadvantage of alternative discourses. Another concern is subjectivity of values and the concomitant risk of employing the language of values as an instrument of self-aggrandisement.¹³ Yet, in contrast to other value-oriented conceptions of the international legal order, global constitutionalism is a *legal* approach based on considerations of legality, foreseeability and legal stability. Its positive nature is enhanced by the fact that, even though a normative agenda of a more just and efficient legal order constitutes one of its themes, global constitutionalism is an overwhelmingly descriptive approach as it *captures* and *describes* structural changes and developments in international law.

Against this backdrop, it will be examined how this new framework of global constitutionalism modifies the very premises of international law within such foundational domains as the doctrine of sources, custom, soft law thesis and treaty interpretation and what place the right to democracy holds in international law based on neoliberal assumptions.¹⁴ The argument for the right to democracy will also be bolstered from the standpoint of external and internal mechanisms for democracy defence, including collective responses to military coups and other extra-constitutional changes of government and peoples' ultimate right to revolution as a protection mechanism at the grass-root level.

mutually reinforcing and that they belong to the universal and indivisible core *values* and *principles* of the United Nations') (emphasis added).

¹³ The most pronounced critique of the value-loaded conceptions of the international legal order is advanced by Martti Koskeniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) 16 EJIL 113, 122 (Arguing that all substantive universalism is imperialism). See also Emmanuelle Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?' (2007) 18 EJIL 379, 382.

¹⁴ It is of note here that neoliberalism, as the term is used in the present thesis, denotes a political development involving the global spread of democracy and respect for human rights. Therefore, neoliberalism as an economical project entailing the expansion of capitalism into the closed economies together with world-wide deregulation, liberalisation and privatisation does not constitute the focus of this work.

Put within the value-sensitive setting of global constitutionalism, these developments acquire a whole new dimension in international legal discourse.

This thesis is organised into seven chapters. With this chapter being introductory, chapter 2 sketches out the methodological framework of the thesis. It first traces the theoretical pedigree of global constitutionalism, which is eventually tested against other dominant approaches in international law. Firstly, it is established that global constitutionalism is a variation of new liberalism whose distinctive features are the promotion of a certain core of substantive values, including democracy, and intolerance towards states reneging upon these values. Because any value-based conception of international law involves a subjective judgment over the exact content and contours of 'global' values, it is easily susceptible to abuse and manipulation by individual (predominantly powerful) states following their egoistic short-handed interests. Many fear that this is reminiscent of the nineteenth-century 'standard of civilisation' under which states' self-proclaimed altruistic motives to advance human rights and development served as a cloak for geostrategic power control. For others, any value-oriented interpretation of international law is intrinsically hegemonic because it is premised on the progressive reading of history: whenever certain values are claimed from the position of authenticity to stand over and above competing ideas, they reflect a progress narrative which by definition involves power relations and an ideological struggle during which some will gain and others will lose. In response to these major critiques of new liberalism in general and global constitutionalism in particular, it is asserted that the contemporary value talk is not imposed upon the international community, as is the case with the old standard. Rather it is spawned by the dynamic inherent in modern political, economic and social developments, commonly referred to as globalisation. It is further claimed that albeit global constitutionalism is a progress narrative, it is premised on assumptions that minimise exclusion. Moreover, by appealing to the stratum of norms locating between the binary concepts of 'legal' and 'illegal', global constitutionalism mitigates the rigidity and undisputed correctness of the progress narrative constructed by the mainstream legal scholarship. Secondly, the theoretical soundness of constitutionalist reading of international law is enhanced by responding to the criticisms of other major theoretical approaches in law, such as conventional legal positivism, naturalism and critical legal studies. It is concluded that global constitutionalism oscillates between positivist apologetics and naturalist utopianism by combining the 'culture of formalism' with the ability to effectively respond to the extra-legal challenges of the twenty-first-century conditions of rapid change. In conclusion, it is argued that global constitutionalism as a legal approach falls under the ambit of the 'law-in-context' research.

Chapter 3 aims to revisit the perennial debate on conceptual limits of democracy and attempts to develop a definition of democracy accommodating the perspectives of the global constitutionalism paradigm. The thesis contends that the dominant procedural understanding of democracy in the mainstream legal scholarship is inadequate as it compromises the normative value of

democracy as a tool of political empowerment and equality. Moreover, such minimalist conception of democracy renders the right toothless against abuse by anti-democratic actors. Instead, a novel substantive definition of democracy is suggested. Unlike the substantive definition of ‘anything goes’ of the previous years, the so-called ‘limited’ substantive conception is developed drawing on modern understandings of the doctrines of constitutionalism and liberalism.

Chapter 4 examines the international legal foundations of democracy within the framework of global constitutionalism. It is suggested that international law exhibits strong empirical evidence of its constitutionalisation, which is characterised by major transformations in such foundational subject-areas as treaty interpretation, the doctrine of customary law formation and the doctrine of sources. Because the principle of state consent as the criterion for the validity of legal norms is no longer the dominant one, non-consensual tendencies within international law-making, such as teleological interpretation of treaties, modern approaches to custom, softening of international law and ever-frequent recourse to general principles of international law, gain traction. Applied in tandem, they provide robust legal foundations for the democratic entitlement and make up an international law of democracy.

Chapter 5 lays out external mechanisms of democracy defence, including collective responses to military coups and other democratic threats at the global level as well as in regions, such as Europe, the Americas, Africa and Asia. Even though the practical implementation of a right does not change its nature as a legal right, evidence of the international enforcement of the democratic norm inevitably strengthens the democratic entitlement thesis. It is further asserted that despite the differences in scope and robustness of the external system of democracy defence on the international and regional levels, the general tendency of increased institutionalisation of such mechanisms speaks eloquently in favour of the right to democracy as an internationally enforceable right.

Chapter 6 investigates in turn how democracy is protected within a nation-state, including by means of revolution as a last resort. Because the international enforcement of the right to democracy is patchwork and sensitive to the considerations of political expediency, the bottom-up resistance, including by violent means, is indispensable if the right to democracy is not to be dismissed as an empty rhetoric. The chapter seeks to delineate the conceptual contours of the notion of revolution as a bottom-up mechanism of democracy defence and traces its philosophical and legal underpinnings. It is established that revolution is an individual right *sui generis* under international law by virtue of its secondary (remedial) status with respect to other, more conventional, rights. Such extraordinary *sui generis* status of revolution is clarified by reference to the ‘illegal but justifiable’ formula, based on a consideration that in order to maintain law’s legitimacy, it is essential to recognise certain limited acts of violence in collective defence of human rights as illegal but legitimate. Because the recognition of ‘illegal but justifiable’ revolution implies that non-state actors are sometimes allowed to use force

against sitting governments, the imperative of laying down an effective framework of differentiation between such morally justified violence and other less benevolent forms of non-state violence, as terrorism, has never been this acute. In other words, the effectiveness of the internal mechanism of democracy defence, not to mention the very normative sustainability of the democratic entitlement thesis, plainly depends on the existence of criteria to distinguish between the legitimate (remedial) violence, such as revolution, and illegitimate (offensive) violence, such as terrorism. To this end, a set of just war criteria, including legitimate cause, legitimate means, legitimate target and a set of legitimate conditions, is applied. It is concluded that whenever non-state violence abides by the aforementioned strata of ethical norms, it is by definition legitimate.

The so-called right-to-revolution thesis is subsequently tested against the backdrop of the Arab Spring revolutions and the 2014 Ukrainian revolution in terms of international responses. It is asserted that albeit the grass-root resistance against oppressive government has not yet been crystallised into a customary norm, international support of the people's efforts to remove nondemocratic regimes, and violently if necessary, creates an important presumption in favour of permissibility of revolutionary violence provided that other conditions are met. It is further claimed that because *opinio juris* behind the practice of global support of revolutionary cause is rather pinned on the considerations of morality and political expediency rather than a sense of an obligation that such practice is legally required, the right to revolution can at best be designated as an emerging norm of customary international law.

Finally, conclusions are presented in chapter 7.

2. Theoretical Framework: Constitutionalist Transformation of International Law

2.1. Classical Liberalism v New Liberalism

Theorising in international law has never been a normatively neutral exercise. All of us look at law and interpret legal texts from a certain standpoint based on what one's underlying assumptions about law as a social phenomenon are. A certain coherent accumulation of assumptions makes up a theoretical paradigm, which frames the direction of research, informs what is to be regarded as legitimate knowledge and involves epistemological assumptions.¹ In legal science, such theoretical paradigm provides an abstract framework for understanding, systematising, explaining, conceptualising and objectivising international law as a science and as a discipline. It is a sort of 'lens' through which to view international law, which are always present irrespective of one's awareness and/or explicitness. Not infrequently, one can consciously deploy a certain approach to, and/or perspective on, international law as a tactic of 'wordfare' in an attempt to gain interpretative authority and persuasiveness in the interpretative community of international law.² There is nothing obnoxious or unsettling in such use of semantic weaponry, because the term 'law' has no inherent claim to mean something well defined but is rather a matter of definition. Therefore, any theory of law is nothing but a claim, whose normative strength depends on the number of its supporters and not some objective normativity.³ Thus, if one accepts the hermeneutic premise that the objective meaning of a text, independent of the reader, does not exist, then reading international law through certain theoretical 'spectacles' is an ordinary hermeneutic exercise, a legitimate form of interpretation, not a distortion of norms which are 'objectively' something else.⁴ Since any research in social

¹ Bridget Hutter and Sally Lloyd-Bostock, 'Law's Relationship with Social Science: The Interdependence of Theory, Empirical Work and Social Relevance in Socio-Legal Studies' in Keith Hawkins (ed), *The Human Face of Law: Essays in Honour of Donald Harris* (OUP 1997) 25.

² Jean d'Aspremont, 'Wording in International Law' (2012) 25 LJIL 575, 576.

³ Ulrich Fastenrath, 'Relative Normativity in International Law' (1993) 4 EJIL 305, 331; Jean d'Aspremont, 'Wording in International Law' (2012) 25 LJIL 575, 582 ('[P]roduction of knowledge boils down to a process of securing argumentative authority among one's peers, which is parasitic on the process of communication between the actors of that community').

⁴ See Anne Peters and Klaus Armingeon, 'Introduction — Global Constitutionalism from an Interdisciplinary Perspective' (2009) 16 Ind J Global Legal Stud 385, 385. For a similar viewpoint, see Jean d'Aspremont, 'Wording in International Law' (2012) 25 LJIL 575, 577 (Maintaining that 'since the demise of philosophical foundationalism and that of the Aristotelian idea of an inner meaning of words, scholarship about international law is no longer perceived as a mining activity geared towards the extraction of pre-existing meaning. Rather, international legal scholarship is in a state of fierce competition for persuasiveness and semantic authority').

sciences, including law, is conducted against the background of a certain theoretical frame of reference, either intuitively or in a reflective manner, making such frame of reference explicit aids in ensuring a transparency of argument⁵ and safeguards objectivity and neutrality of research results by maintaining a controlled distance between the researcher's subjectivities and the object of research. Such methodological self-consciousness and 'reasoned eclecticism'⁶ do not amount to a 'shopping-mall approach to "method",'⁷ but 'are a precondition of informed criticism, which is, in turn, the *conditio sine qua non* of scholarship and of a functioning civil society'.⁸

That being said, theoretically and methodologically, this work is based on the neoliberal reading of international law.⁹ The thesis argues for the inadequacy of the traditional theory in depicting and explicating the functioning of the modern international legal system. By traditional theory of/about international law, it is meant a theory of law largely based on, if not fully coincident with, legal positivism.¹⁰ Legal positivism as the principal theoretical paradigm for mainstream legal scholarship associates law with the emanation of state will (voluntarism). Thus, law is essentially what states have consented to be bound by, simply and strictly so called. Another common understanding of positivism zeros in on the strict separation of law in force, as derived from formal legal sources, from non-legal considerations, such as natural reason, moral principles and political ideologies (formalism).¹¹ On both accounts, law is viewed as an 'objective' reality, which needs to be distinguished from 'law as it should be'.

Apart from questioning the assumption that law is an objectively given fact having a certain inner, pre-existing meaning, there are several other reasons

⁵ Anne Peters, 'There is Nothing More Practical than a Good Theory: An Overview of Contemporary Approaches to International Law' (2001) 44 German YBIL 25, 37 ('[M]ethodological explicitness is preferable because it contributes to a transparency of argument').

⁶ *ibid.*

⁷ Martti Koskeniemi, 'Letter to the Editors of the Symposium' (1999) 93 AJIL 351, 352.

⁸ Anne Peters, 'There is Nothing More Practical than a Good Theory: An Overview of Contemporary Approaches to International Law' (2001) 44 German YBIL 25, 37. See also Steven R Ratner and Anne-Marie Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93 AJIL 291, 291 (Contending that focus on theory is increasingly needed in a field of international law driven to great degrees of both specialisation and fragmentation).

⁹ Whenever the adjective 'neoliberal' is used in this thesis, it refers to the value-oriented nature of international law as opposed to the Westphalian state-centred paradigm.

¹⁰ See eg Douglas Vick, 'Interdisciplinarity and the Discipline of Law' (2004) 31 JLS 163, 188 ('[T]raditional doctrinal approach to legal questions is the touchstone of the disciplinary identity of legal academics'); Robert Cryer and others (eds), *Research Methodologies in EU and International Law* (Hart Publishing 2011) 39 ('Positivism is the dominant approach amongst international lawyers [...] It represents the default position of many international and EU lawyers'); Siegfried Wiessner (ed), *General Theory of International Law* (Nijhoff 2017) 15 (Recognising legal positivism as a 'traditional theory about international law').

¹¹ Bruno Simma and Andreas L Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (2009) 93 AJIL 291, 304; See also Jaye Ellis, 'General Principles and Comparative Law' (2011) 22 EJIL 949, 953.

why the present research distances itself from this traditional framework. The first concern, which is widely shared within scholarly circles, is that while the value of the doctrinal research (based on legal positivism) is hard to overestimate, particularly for legal practitioners involved in the daily ascertainment of what rule is valid and where it is located, doctrinalism is often accused of being ‘arid, technical, atheoretical [...] full of unstated or unproven assumptions, lacking empirical support’;¹² ‘rigid, dogmatic, formalistic and close-minded’ encouraging ‘intellectual tunnel-vision’ through an unhealthy preoccupation with technicalities;¹³ placing ‘an intellectual strait-jacket on understandings of law and society’ and ‘of impoverish[ing] the questioning spirit’ of a researcher.¹⁴ Legal positivism, in particular, remains fixated on the past, ‘seemingly disinterested in the actual dynamics of political and social change’,¹⁵ and is unable to tackle the concerns of the modern globalising and increasingly interdependent society. Most significantly, it fails to provide a means for linking validity, or legality, with legitimacy, or morality, justice, political feasibility etc. Whereas in domestic legal orders, the adherence to the positivist conceptual apparatus is well justified considering the existence of secondary norms serving as a yardstick to determine the validity of primary norms (legal constitution), in international law it is much more difficult to determine the ‘positiveness’ of a norm because secondary norms are either utterly absent or are dispersed throughout different legal regimes. It means that in order to fully understand the operation of international law, other theoretical perspectives are necessary.¹⁶

The exhaustion of positivist toolkit to effectively respond to the contemporary conditions of rapid change is visible in the ever-frequent resort to some ‘higher-legitimacy’ arguments, including moral arguments, what was dubbed by some scholars as a ‘turn to ethics in international law’.¹⁷ The most obvious example is the 1999’s Kosovo crisis, when the NATO’s military intervention was widely recognised as technically illegal but morally justified.¹⁸ Thus, legitimacy as an embodiment of higher moral values (as

¹² Grainne de Burca, ‘Rethinking Law in Neofunctionalist Theory’ (2005) 12 JEPP 310, 314.

¹³ Roger Cotterrell, ‘Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies’ (2002) 29 JLS 632, 633.

¹⁴ Douglas Vick, ‘Interdisciplinarity and the Discipline of Law’ (2004) 31 JLS 163, 181.

¹⁵ Grainne de Burca, ‘Rethinking Law in Neofunctionalist Theory’ (2005) 12 JEPP 310, 314.

¹⁶ In the same vein, see the remarks given by Jean d’Aspremont, ‘Reductionist Legal Positivism in International Law’ (2012) 106 ASIL Proc 368, 370. (Arguing that ‘international law is much more than a set of rules. Other theories are thus necessary to explain the whole phenomenon of international law [...] A renewed ILP [international legal positivism] is only needed to assist us ascertain and identify rules of international law, not to explain the whole phenomenon of law’).

¹⁷ Martti Koskeniemi, ‘“The Lady Doth Protest Too Much”: Kosovo, and the Turn to Ethics in International Law’ (2002) 65 MLR 159.

¹⁸ The Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000) 4 (‘The Commission concludes that the NATO military intervention was illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a

opposed to a less contested notion of procedural legitimacy)¹⁹ was invoked to dispense with ‘undesired’, ‘obsolete’ and ‘morally unacceptable’ legality. Whilst laudable on moral grounds, such legitimacy-talk stands at loggerheads with essential premises of legal science, such as legality, predictability, neutrality, procedural justice etc. Because it is normatively obscure and there is no undisputed authority to assess it, the legitimacy rhetoric seems to be easily susceptible to abuse by hegemonic powers following their strategic interests. To allow the (substantive) legitimacy rationale in international law is, in the opinion of many, to make a mockery of the foundational principle of state equality.²⁰

That said, the paucity and inadequacy of positivist *assortment* of argumentative techniques and approaches in explicating, theorising and addressing contemporary global challenges leads to the legitimacy crisis of international law, which, in turn, is inextricably linked with the questions of the moral force of international law (legitimacy) or, simplifying somewhat, the duty to obey international law. If the principal legitimating factor of Westphalian international law was state consent, properly so called, what can be said of the post-Westphalian legal order assuming an increasingly autonomous role vis-a-vis individual states? Where does legitimacy reside within this new framework? What has left of state sovereignty in a system where ‘the procedure by which international law is generated increasingly attenuates the link between state consent and the existence of an obligation under international law’?²¹ How can this ‘new’ international law claim obedience? These questions, reflecting the *geist* of the twenty-first-century legal order, bring to the fore a plethora of theoretical and practical challenges which positivist orthodox schema cannot handle on its own. There is thus a need for a new theory (or at least a theoretical conception) of international law equipped with an adequate conceptual and argumentative apparatus to account

long period of oppression under Serbian rule’). See also Antonio Cassese, ‘*Ex iniuria ius oritur*: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the International Community?’ (1999) 10 EJIL 23, 30; Bruno Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 EJIL 1. For particularly useful discussions of the international lawyers’ reaction, cf Siegfried Schieder, ‘Pragmatism as a Path towards a Discursive and Open Theory of International Law’ (2000) 11 EJIL 663, 691-98 and Olivier Corten, ‘Les ambiguïtés de la référence au droit international comme facteur de légitimation portée et signification d’une déformalisation du discours légaliste’ in Olivier Corten and Barbara Delcourt (eds), *Droit, légitimation et politique extérieure. L’Europe et la guerre du Kosovo* (Bruylant 2000) 223-59.

¹⁹ For a useful discussion on various conceptions of legitimacy, see Christopher A Thomas, ‘Uses and Abuses of Legitimacy in International Law’ (2014) 34 OJLS 729, 749.

²⁰ To claim that the substantive legitimacy language is prone to misuse is not to advocate its unqualified rejection in legal doctrine. It is merely to emphasise that traditional legal doctrine lacks conceptual tools to accommodate the substantive legitimacy rationale. Global constitutionalism is a more suitable framework for advancing legitimacy claims. See section 6.3.6.

²¹ Mattias Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’ (2004) 15 EJIL 907, 914.

for these changes and to resolve, or at least mitigate, the legitimacy crisis of international law.

The present thesis seeks to address these challenges by revising the very theoretical platform on which international law is based. It is possible to argue that the above discussion of doctrinal research as underpinned by legal positivism is reflective of classical liberalism – a conventional paradigm of international law whose main distinctive features are tolerance, diversity and agnosticism about moral truth. In this configuration, a ‘liberal’ international system in the traditional sense does not have its own vision of The Good, but it was designed to enable every state to realise its own understanding of The Good, its own value system.²² Simpson designated this as ‘Charter liberalism’ because the underlying premises of this approach are explicitly enshrined in the UN Charter.²³ Classical liberalism directly stems from domestic liberalism as a political theory and philosophy, which was developed at the Age of Enlightenment with the aim of securing negative liberty, that is liberty from arbitrary authority.²⁴ On this view, state, similarly to the individual in a liberal society, enjoys a zone of private action embodied in the doctrine of domestic jurisdiction, which is protected by law. As Simpson put it, ‘where domestic liberal theory appeals to a conception of the individual as a bearer of rights and a democratic actor, classical liberalism substitutes the State for the individual and posits the nation-State as the free and equal object and subject of international law’.²⁵ *Ergo*, such fundamental principles of international law as domestic jurisdiction, sovereignty, territorial integrity and non-intervention are classical liberal principles. Respect for these principles has become the touchstone of the classical international liberal theory.²⁶

Classical liberal theory of international law, which, as was earlier ascertained, lays down philosophical foundations for legal positivism, has been criticised on two principal grounds. First, by viewing states as autonomous subjects possessing an inherent right to sovereignty, the theory fails to take into

²² Louis Henkin, ‘International Law: Politics and Values’ in Siegfried Wiessner (ed), *General Theory of International Law* (Nijhoff 2017) 286.

²³ Gerry Simpson, ‘Two Liberalisms’ (2001) 12 EJIL 537, 541. See also Georg Sorensen, ‘Liberalism of Restraint and Liberalism of Imposition: Liberal Values and World Order in the New Millennium’ (2006) 20 Int’l Rel 251, 259 (Claiming that classical liberalism essentially embodies a ‘Liberalism of Restraint’ with its key emphasis on one’s own sphere of liberty, which can only be infringed by preventing harm to others).

²⁴ The foundational ideas of classical liberal thought are: 1) the central place of individual in society as a bearer of natural rights; 2) limited state; 3) representative government; and 4) free trade and protection of property rights. See Milja Kurki, *Democratic Futures: Revisioning Democracy Promotion* (Routledge 2013) 31-32.

²⁵ Gerry Simpson, ‘Imagined Consent: Democratic Liberalism in International Legal Theory’ (1994) 15 Aust YBIL 103, 113.

²⁶ See Michael W Doyle, ‘Kant, Liberal Legacies and Foreign Affairs’ (1983) 12 Phil & Pub Aff 205, 213. See also Louis Henkin, *International Law: Politics and Values* (Springer 1995) 104, 106 (Opining that the international system is essentially a ‘liberal’ system allowing both secular and religious, authoritarian and democratic states to co-exist under the paradigmatic Charter norm of the prohibition of the use of force). See also Olena Sihvo, ‘Global Constitutionalism and the Idea of Progress’ (2018) 1 HLR 10, 17.

cognisance the need for cooperation to resolve both own and global environmental, ecological and security problems. Second, the ‘arbitrariness of value’ cherished by classical liberalism entails the denial of any binding principles existing above states, such as e.g. human rights. Because there is no agreement on precise definition of human rights, the argument that human rights impose restrictions on state power to protect individual liberty fails on the same ground as other natural law doctrines, against which classical liberalism legitimised itself.²⁷ As Koskeniemi provocatively suggested

[L]iberalism contains two separate strands which continuously threaten each other. The ascending strand legitimizes political order by reference to individual ends. The existence of natural values is denied. Individuals can be constrained only to prevent ‘harm to others’. But any constraint seems a violation of individual freedom as what counts as ‘harm’ can only be subjectively determined. The descending strand fares no better. It assumes that a set of fundamental rights or a natural distinction between private and public spheres exists to guarantee that liberty is not violated. But this blocks any collective action as the content of those freedoms (either as ‘rights’ or a ‘private sphere’) can be justifiably established only by reference to individuals’ views thereof.²⁸

Thus, there is a constant tension between global concerns and individual rights that lies at the heart of liberalism: ‘[I]f liberalism preserves its radical scepticism about values, then it cannot ground a coherent problem-solving practice — if it makes reference to the objective nature of some values it will undermine liberty’.²⁹

It follows from the above-mentioned dilemma that there is also another understanding of what it means to be liberal. This is, according to Simpson, ‘liberal anti-pluralism’,³⁰ sometimes characterised as ‘liberal internationalism’,³¹ ‘new liberalism’, ‘neo-liberalism’, ‘liberal universalism’,³² ‘liberal millenarianism’,³³ ‘new liberal cosmopolitanism’³⁴ or ‘liberalism of

²⁷ See Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 84-85.

²⁸ *ibid* 87.

²⁹ *ibid* 89.

³⁰ Gerry Simpson, ‘Two Liberalisms’ (2001) 12 EJIL 537, 537.

³¹ Beate Jahn, *Liberal Internationalism: Theory, History, Practice* (Palgrave Macmillan 2013).

³² John Charvet and Elisa Kaczynska-Nay, *The Liberal Project and Human Rights: The Theory and Practice of a New World Order* (CUP 2008) 60.

³³ Susan Marks, ‘The End of History? Reflections on Some International Legal Theses’ (1997) 3 EJIL 449.

³⁴ Peter Gowan, ‘The New Liberal Cosmopolitanism’ in Daniele Archibugi (ed), *Debating Cosmopolitics* (Verso 2003) 52 (Under new liberal cosmopolitanism ‘sovereignty is reconceived as a partial and conditional licence, granted by the “international community”, which can be withdrawn should any state fail to meet the domestic or foreign standards laid down by the requirements of liberal governance’).

imposition’.³⁵ This ‘new’ type of liberalism is endowed with a sort of moralistic fervour as it conceptualises equality as a condition of fulfilling certain ‘neo-liberal’ criteria and is intolerant of the illiberal.³⁶ The central point of liberal anti-pluralism is to differentiate between states on the basis of their internal characteristics. International human rights law serves as an inspiration and a primary driving force for this strain of liberalism.³⁷ Unlike classical liberalism that views states as sole subjects of international law, new liberalism gives ontological priority to individuals.³⁸ It is a liberalism ‘ready to defend liberty where it was threatened’.³⁹ The conceptual difference between the two species of liberalism is also neatly captured by Cryer *et al* who categorise classical liberalism as an Enlightenment philosophy under the rubric ‘modern and critical approaches’ to international law, whilst liberalism as an international relations theory (new liberalism) is included into the group ‘law and [international relations]’.⁴⁰

Notably, contrary to classical liberalism, new liberalism, as a theory, has a different pedigree: it was first developed by Moravcsik in the field of international relations as a principle alternative to realism. Although he acknowledged that conceptually this theory draws on domestic liberal political doctrine, he nonetheless claimed that a direct transfer of classical liberal assumptions to international law was problematic, and, hence, it made more sense to attempt to conceptualise this theory on its own terms as a self-contained anti-realist thesis.⁴¹ Moravcsik’s central argument is that liberalism has made a transition from a normative (prescriptive) theory instructing states as to how they should conduct their foreign policies with other states to a positive (explanatory) theory that accounts for how states do interact with one another.⁴² On this account, states as members of international society are not

³⁵ Georg Sorensen, ‘Liberalism of Restraint and Liberalism of Imposition: Liberal Values and World Order in the New Millennium’ (2006) 20 Int’l Rel 251, 259 (Liberalism of Imposition assumes active intervention by the state to ensure the proper conditions for real freedom).

³⁶ Gerry Simpson, ‘Two Liberalisms’ (2001) 12 EJIL 537, 539; Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (CUP 2004) 78. See also Olena Sihvo, ‘Global Constitutionalism and the Idea of Progress’ (2018) 1 HLR 10, 17-18.

³⁷ Gerry Simpson, ‘Two Liberalisms’ (2001) 12 EJIL 537, 541.

³⁸ Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (CUP 2004) 81.

³⁹ Georg Sorensen, ‘Liberalism of Restraint and Liberalism of Imposition: Liberal Values and World Order in the New Millennium’ (2006) 20 Int’l Rel 251, 261.

⁴⁰ See Robert Cryer and others (eds), *Research Methodologies in EU and International Law* (Hart Publishing 2011) ch 5.

⁴¹ See Andrew Moravcsik, ‘Liberalism and International Relations Theory’ (1992) Center for International Affairs Working Paper No 92-6, Harvard University <https://www.princeton.edu/~amoravcs/library/liberalism_working.pdf> accessed 23 August 2016.

⁴² Andrew Moravcsik, ‘Taking Preferences Seriously: A Liberal Theory of Politics’ (1997) 51 Int’l Org 513, 514. A number of other political scientists too have showed an interest in developing core foundations of liberalism as a rival theory to realism. See Joseph S Nye, ‘Neorealism and Neoliberalism’ (1988) 40 Wld Pol 235; Robert Powell, ‘Anarchy in International Relations Theory: The Neorealist-Neoliberal Debate’ (1994) 48 Int’l Org 313; Mark W Zacher and Richard A Matthew, ‘Liberal International Theory: Common Threads,

equated to individuals in domestic settings. Rather they are aggregations of individuals and private groups advancing multifarious preferences. This new liberalism, or what he called liberal international relations (IR) theory, was later on transposed by Slaughter to international law.⁴³ She suggested that Westphalian international law was based on classical liberal assumptions. It did not distinguish among sovereign states: 'Democracies, theocracies and all manner of autocracies are deemed identical under the all-purpose label of sovereignty'.⁴⁴ Any distinction on the basis of political regime was strictly forbidden.

However, with the Cold War approaching its end, a number of political scientists, after undertaking thorough empirical analysis, pioneered the need to distinguish between liberal and illiberal states on the basis of their external behavioural patterns, which came to be known as a 'democratic peace theory'.⁴⁵ According to this theory, liberal states created a separate zone of peace and did not wage wars with one another. Illiberal states, conversely, remained in the 'zone of politics' virtually unrestrained in their actions in the global realm.⁴⁶

Slaughter's liberal IR theory moved beyond this correlation between liberal democracy and peace and interrogated what other characteristics liberal states have that distinguish them from their illiberal counterparts. It is founded on three core assumptions. First, individuals and private groups are primary actors in domestic and international politics informing state's preferences on the international scene. Second, state is not an autonomous and monolithic entity as propagated by realists, but a representative institution whose foreign policies are determined by preferences of individuals and groups enfranchised by domestic institutions and practices. Third, the accumulation of these individual and group preferences determines the outcome of state interactions.⁴⁷ On this view, 'states bear no resemblance to billiard balls but rather to atoms of varying composition, whose relations with one another,

Divergent Strands' in Charles W Kegley (ed), *Controversies in International Politics: Realism and the Neoliberal Challenge* (St Martin's Press 1995).

⁴³ Anne-Marie Burley [now A-M Slaughter], 'Toward an Age of Liberal Nations' (1992) 33 Harv Int'l LJ 393; Anne-Marie Slaughter, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 AJIL 205.

⁴⁴ Anne-Marie Slaughter, 'Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine' (1992) 92 Colum L Rev 1907, 1909.

⁴⁵ Philosophical roots of this theory go back to Kantian assumption that people are rational and prefer peace to war. Immanuel Kant, 'Perpetual Peace' (1795) in Ted Humphrey (ed), *Perpetual Peace and Other Essays on Politics, History, and Morals* (Hackett Publishing Company 1983). The empirical foundation of 'liberal peace' is based on studies illustrating the absence of war between liberal democracies. See eg Bruce Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World* (Princeton UP 1993); Michael Brown and others (eds), *Debating the Democratic Peace* (MIT Press 1996). For criticisms see eg Tony Smith, 'Democratic Peace Theory: From Promising Theory to Dangerous Practice' (2011) 25 Int'l Rel 154.

⁴⁶ Olena Sihvo, 'Global Constitutionalism and the Idea of Progress' (2018) 1 HLR 10, 16.

⁴⁷ Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 EJIL 503, 508. See also Andrew Moravcsik, 'The New Liberalism' in Robert E Goodin (eds), *The Oxford Handbook of Political Science* (OUP 2011) 714.

either cooperative or conflictual, depend on their internal structure'.⁴⁸ The upshot of this argument is that states constituted along democratic lines behave differently at the international orbit than non-democratic (illiberal) states.⁴⁹

Subsequent works, including Simpson's *Two Liberalisms*, draw heavily on Moravcsik and Slaughter's theory but are more explicit in promoting neoliberal agenda.⁵⁰ In fact, they defend a return to normative (or prescriptive) liberalism in the sense that they do not only explain why liberal states behave differently than illiberal ones but also seek to challenge the over-inclusive orientation of international legal order by substituting it with the one in which status of states is defined by their degree of acceptance of certain individual rights, including the so-called 'right to democracy'.

It is clear from the aforementioned that international law in the age of globalisation is inconceivable without a certain value core not only to act as a sort of glue keeping increasingly numerous and manifold legal regimes together but also to secure prompt response to legal and political challenges of the twenty-first-century international community whenever legal norms on the issue are either absent or too generic to serve as an effective guide for action. Neoliberal conception of international law provides a solid theoretical ground for approaching international law as a value-sensitive normative system. However, because any value-oriented conception of international law involves a subjective judgment of what those values are, it easily falls prey to political manipulation. Particularly small and weak states fear the fact that the colonial history of differentiation and subjugation concealed under the language of 'civilisation' may be repeating itself. The next section addresses this issue in more detail.

2.2. New Liberalism — a 'New Standard of Civilisation'?

The very idea of a distinction between liberal (democratic) and illiberal (non-democratic) states may prove unwelcome to many. The main reason behind such aversion is its historical pedigree. Many scholars beware the fact that the nineteenth-century division between 'civilised' and 'barbarian' is now cast in the language of democratic legitimacy.⁵¹ The division in question manifested

⁴⁸ Anne-Marie Slaughter, 'A Liberal Theory of International Law' (2000) 94 ASIL Proc 240, 241.

⁴⁹ Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 EJIL 503, 509.

⁵⁰ Gerry Simpson, 'Two Liberalisms' (2001) 12 EJIL 537; Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (CUP 2004); Georg Sorensen, 'Liberalism of Restraint and Liberalism of Imposition: Liberal Values and World Order in the New Millennium' (2006) 20 Int'l Rel 251; Russell Buchan, 'A Clash of Normativities: International Society and International Community' (2008) 10 Int'l CI Rev 3; Russell Buchan, *International Law and the Construction of the Liberal Peace* (Hart Publishing 2013).

⁵¹ Christopher Hobson, 'Democracy as Civilization' (2008) 22 Glob Soc 75, 84.

itself under the banner of the ‘standard of civilisation’, which is, in Gong’s terms, ‘an expression of the assumptions, both tacit and explicit, used to distinguish those that belong to a particular society from those that do not’.⁵² Whilst the origins of this standard go back to the medieval relations between Christians and infidels (9-13th centuries) and are well traceable in European encounters with the New World (15-16th centuries),⁵³ the beginning of the classical standard of civilisation is largely associated with the mid-nineteenth century.⁵⁴ The emergence of this classical standard was occasioned by the need to accommodate and ultimately homogenise cultural differences between Western and non-Western societies in order to facilitate trade and interaction. In legal terms, a state was recognised as ‘civilised’ and, thus, ‘entitled to full recognition as an international personality’ whenever ‘its government was sufficiently stable to undertake binding commitments under international law’ and whenever ‘it was able and willing to protect adequately the life, liberty and property of foreigners’.⁵⁵ While it is undeniable that the language of civilisation contained certain benevolent connotations, namely to ameliorate the dark condition of ignorance and barbarism and advance Western knowledge, science and culture, the means by which civilising missions, or *missions civilisatrices*, were conducted were often violent, destructive and ostracising,⁵⁶ particularly in terms of their effects on indigenous populations.⁵⁷ Moreover, the politics of inclusion and exclusion wrapped in the language of civilisation, evidenced the ever-present interplay of power relations rather than altruistic motives to advance development.

With the termination of the Cold War rivalries between East and West and the alleged triumph of liberal democracy, many scholars suggest there was a reinvigoration of the nineteenth-century standard of civilisation. It is now said to be visible in the politics of liberal anti-pluralism, where states failing to meet neoliberal criteria of democracy, the rule of law and human rights are excluded from the international community of liberal states as outlaws or pariahs.⁵⁸ As

⁵² Gerrit W Gong, *The Standard of ‘Civilization’ in International Society* (OUP 1984) 3.

⁵³ See generally Brett Bowden, ‘The Colonial Origins of International Law: European Expansion and the Classical Standard of Civilization’ (2005) 7 *J History Int’l L* 1, 4-13.

⁵⁴ Wilhelm G Grewe, *The Epochs of International Law* (Michael Byers tr and rev, Walter de Gruyter 2000) 445-58; Christopher Hobson, ‘Democracy as Civilization’ (2008) 22 *Glob Soc* 75, 80; Brett Bowden, *The Empire of Civilization: The Evolution of an Imperial Idea* (The University of Chicago Press 2009) ch 5.

⁵⁵ Georg Schwarzenegger, ‘The Standard of Civilization in International Law’ (1955) 8 *CLP* 212, 220. For a more detailed account, see Brett Bowden, *The Empire of Civilization: The Evolution of an Imperial Idea* (The University of Chicago Press 2009) 16.

⁵⁶ Brett Bowden, *The Empire of Civilization: The Evolution of an Imperial Idea* (The University of Chicago Press 2009) 130.

⁵⁷ Paul Keal, *European Conquest and the Rights of Indigenous Peoples* (CUP 2003).

⁵⁸ See Benedict Kingsbury, ‘Sovereignty and Inequality’ in Andrew Hurrell and Ngaire Woods (eds), *Inequality, Globalization and World Politics* (OUP 1999) 66, 90; Gerry Simpson, ‘Two Liberalisms’ (2001) 12 *EJIL* 537, 546; David P Fidler, ‘The Return of the Standard of Civilization’ (2001) 2 *Chic J Int’l L* 137, 146; Christopher Hobson, ‘Democracy as Civilization’ (2008) 22 *Glob Soc* 75, 84. See also James M Goldgeier and Michel McFaul, ‘A Tale of Two Worlds: Core and Periphery in the Post-Cold War Era’ (1992) 46 *Int’l Org* 467; Max Singer and

Hobson has astutely noted, '[o]nce again we find ourselves inhabiting a dualistic international order where toleration and coexistence are the norm within the liberal democratic zone of peace, while *Realpolitik* and 21st-century civilizing missions mark dealings with the non-democratic zone of war'.⁵⁹

Considering the fact that new liberalism is loaded with the conceptions of progress (it is based on a linear reading of human history), *telos* (the aim is to extrapolate liberal values to the international society at large) and action (undertaking active measures in order to create a liberal zone of peace), originally attributed to the concept of civilisation,⁶⁰ it comes as no surprise that it is widely referred to as a 'new standard of civilisation'. Just like its nineteenth-century counterpart, it 'evaluates, judges, classifies, orders and excludes'⁶¹ by dividing the world into zones. 'Whether this division is characterized as a dichotomy between the "well-ordered" and the "not well-ordered", the "civic" and the "predatory", the "good" and the "evil" [...] the "civilized" and the "savage"' or the 'liberal' and the 'illiberal' 'is a matter of semantics'.⁶² Moreover, while the classical standard of civilisation was rather limited and superficial as it only assumed the acceptance of Western socio-political institutions leaving the questions of culture as such intact, the new standard is more far-reaching and intrusive: 'It is being carried deeper into the hearts of non-Western cultures through international law'.⁶³ It is in fact on the basis of this doctrinal distinction between the two standards that some commentators dubbed the nineteenth-century standard as the product of the *Westphalian civilisation*,⁶⁴ or *formal universalism*,⁶⁵ founded on the assumption of uniformity of states, similar enough to conduct political and economic relations with the acceptance of a certain minimum of legal commitments. The twenty-first-century standard is, on the other hand, claimed

Aaron Wildavsky, *The Real World Order: Zones of Peace, Zones of Turmoil* (Chatham House 1993); Deon Geldenhuys, *Deviant Conduct in World Politics* (Palgrave Macmillan 2004); Jack Donnelly, 'Sovereign Inequalities and Hierarchy in Anarchy: American Power and International Society' (2006) 12 EJIR 139.

⁵⁹ Christopher Hobson, 'Democracy as Civilization' (2008) 22 Glob Soc 75, 90-91.

⁶⁰ Ifversen suggested four central attributes of the concept 'civilisation', namely 'evolution, ideal, action and space'. He associates evolution with progress, ideal with the civilized society, action with the act of civilizing and space with a 'cultural macro-entity'. Jan Ifversen, 'Civilization and Barbarism' (2005) Discourse Politics Identity Working Paper No 1, 7-9; Hobson rephrased these characteristics in terms of progress, *telos* and action. Christopher Hobson, 'Democracy as Civilization' (2008) 22 Glob Soc 75, 79. See also Emmanuelle Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?' (2007) 18 EJIL 379, 390-91.

⁶¹ Christopher Hobson, 'Democracy as Civilization' (2008) 22 Glob Soc 75, 95.

⁶² Benedict Kingsbury, 'Sovereignty and Inequality' in Andrew Hurrell and Ngaire Woods (eds), *Inequality, Globalization and World Politics* (OUP 1999) 90. For similar criticisms, see Brett Bowden *The Empire of Civilization: The Evolution of an Imperial Idea* (The University of Chicago Press 2009) 188, 212.

⁶³ David P Fidler, 'The Return of the Standard of Civilization' (2001) 2 Chic J Int'l L 137, 147.

⁶⁴ *ibid* 144-45.

⁶⁵ Emmanuelle Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?' (2007) 18 EJIL 379, 386-88.

to represent a *liberal, globalised civilisation, or substantive universalism*,⁶⁶ with a more ambitious project to establish a universal community of states sharing common values such as respect for basic civil and political rights, commitment to democratic governance, rule of law, free market and scientific development.⁶⁷ Because they do not automatically express anything universal, all substantive universalism, as was provocatively asserted by Koskenniemi, is imperialism.⁶⁸

In light of the above-said, it is difficult to deny commonalities existing between the classical standard and the so-called new standard. Both imply the existence of a hierarchy between nations based on a distinction between full-right members of the international society and members that are stripped of this status. Be that as it may, to automatically blacklist the theory of new liberalism as ‘an exercise in creating the new realities of imperialism’⁶⁹ due to the ‘fatal tainting’⁷⁰ of the abuses committed in the name of civilisation in the nineteenth and twentieth centuries is to drastically oversimplify the similarities between the two standards. Whereas the old standard of civilisation was particularistic in nature and resulted in exclusionary policies, the new standard strives for universality and inclusion.⁷¹ New liberalism as a political doctrine and legal approach is not imposed upon the international society. Rather it is spawned by the dynamic inherent in modern political, economic and social development, commonly referred to as globalisation, which is characterised by deepening interdependence between states, permeability of the domestic and the international, homogenisation of cultures and values and the like. Therefore, values underpinning the new standard are not forced into existence, as is the case with the classical standard, but are shaped by the international community as a whole in response to modern realities through the venues of international organisations, such as the UN, and reflected in multilateral treaties and non-binding commitments. As Mozaffari rightly observed, the new standard operates more through ‘attraction’ than ‘coercion’.⁷² Moreover, modern global challenges, such as climate change, international terrorism, transnational crime, nuclear threat, state failure, civil wars, to name but a few, necessitate the adoption of a certain modicum of common values serving as a sort of a cohesive glue or a normative path in an otherwise fragmented and

⁶⁶ *ibid* 388-92.

⁶⁷ David P Fidler, ‘The Return of the Standard of Civilization’ (2001) 2 *Chic J Int’l L* 137, 147-48; David P Fidler, ‘A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies and the Standard of Liberal, Globalized Civilization’ (2000) 35 *Tex Int’l LJ* 387, 409.

⁶⁸ Martti Koskenniemi, ‘International Law in Europe: Between Tradition and Renewal’ (2005) 16 *EJIL* 113, 122.

⁶⁹ Brett Bowden, *The Empire of Civilization: The Evolution of an Imperial Idea* (The University of Chicago Press 2009) 212.

⁷⁰ Jack Donnelly, ‘Human Rights: A New Standard of Civilization?’ (1998) 74 *Int’l Aff* 1, 15-16.

⁷¹ *ibid* 15.

⁷² Mehdi Mozaffari, ‘The Transformationalist Perspective and the Rise of a Global Standard of Civilization’ (2001) 1 *Int’l Rel Asia Pac* 254, 262-63.

anarchical world. The words of Donnelly astutely reflect these concerns: '[A] standard of civilization is needed to save us from the barbarism of a pristine sovereignty that would consign countless millions of individuals and entire peoples to international neglect'.⁷³ New liberalism is thus individual-centred since unlike the classical standard aiming to solely protect the rights of Western citizens abroad, the new 'liberal' standard imposes limits on how states treat their own citizens. This elevated moral legitimacy of the new standard renders the 'moral evaluation of empire' more complicated 'when one of its benefits might be the freedom of the oppressed'.⁷⁴

It may also be argued that traditional international law still mirrors the classical standard of civilisation as it is a product of Westphalian order which, in its turn, was imposed by European powers upon other societies to ensure uniformity and homogeneity. Only states characterised by certain minimum degree of uniformity could effectively interact with one another. Primary sources of international law, such as treaties and custom, contain remnants of European hegemony in that they allegedly reflect interests of the most powerful.⁷⁵ New liberalism, conversely, can be viewed as ameliorating this historical imbalance by installing *universal*, in contrast to *uniform*, standard of civilisation recognised by the international community at large. Universality of this new standard is visible in the increasingly inclusive participation of states and non-state entities in the processes of international lawmaking for regulating public goods and delineating common values, which is facilitated by the transformation of the core legal doctrines, including the doctrine of sources. For instance, the transformation of the doctrine of custom from its traditional conception to 'modern custom'⁷⁶ implies that more and more states are actively participating in the formation and crystallisation of international customary law as it is international consensus exemplified in the pronouncements of international organisations, such as e.g. the UN, rather than 'consistent' practice of the most powerful and rich states, which is now regarded as formative of custom. The same can be said about the process of softening of international law.

Another reason why new liberalism is so often regarded as illiberal and hence exclusionary (akin to the old standard of civilisation) is the failure to appreciate the fact that under classical liberal doctrine no one is required to tolerate illiberals who seek to inflict damage on them. The doctrine recognises the imposition of limits on one's freedom of action to avoid anarchy in which everyone would claim unrestricted freedom to do whatever he or she pleases.

⁷³ Jack Donnelly, 'Human Rights: A New Standard of Civilization?' (1998) 74 Int'l Aff 1, 15-16.

⁷⁴ Michael Ignatieff, 'The Burden' *New York Times* (New York, 5 January 2003) <<http://www.nytimes.com/2003/01/05/magazine/05EMPIRE.html?pagewanted=all>> accessed 24 August 2016.

⁷⁵ See Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007) 36-39 (Arguing that much of modern international law was shaped by the European colonial encounter with non-European civilisations, with the latter as the objects of reform).

⁷⁶ See section 4.2.2.

Coercion is justified only against someone who reneges upon those limits. Anything less coercive would lead to an anarchic state where the absence of legal constraints on freedom would, in effect, create a situation in which actual freedom would be severely circumscribed.⁷⁷ Thus, considering the empirically established fact that illiberal states are more prone to violate international obligations by waging wars and otherwise infringing liberty of other states (by e.g. creating a state of uncertainty) than liberal nations, it should be no surprise that liberal states are entitled to use coercion against them to protect their interests. The coercion to secure one's own sphere of liberty does not make one illiberal.

Last but not least, presenting the Westphalian era as genuinely liberal due to the negation of thick ethical principles and assigning equal credence to all types of government regimes, and post-Westphalian order as an imposition of a particular (substantive) world vision and, thus, illiberal is a confusion since at no point of human history has the international system been wholly value-free. As Gong notes, 'the processes by which an international system establishes standards to define and codify its operating interests, rules, values, and institutions are continuing ones'.⁷⁸ What is susceptible to change is not the standard itself but its nature and character. 'It may be more or less exclusive, and more or less explicit, depending on a number of factors, the most notable being the "thickness" or "thinness" of the common values that exist between states in international society'.⁷⁹ Thus, the standard of civilisation exists as long as the community of states interacts in one way or another. Consequently, the characterisation by some scholars of a Cold War period from 1945 to 1989 as a rejection of any standards of civilisation⁸⁰ and, thus in a way nostalgic, is misleading and fallacious as it largely refers to the juridical equality of states as enshrined in the UN Charter but fails to account for factual inequality manifesting itself in 'hot wars' in Korea and Indochina and the ostracism of Pinochet's Chile and racist South Africa as pariahs.⁸¹

Hence, such fundamental values as equality and autonomy transcend both classical and new liberalisms. The only difference is that liberal pluralism's conception of these values is somewhat thinner than that of new liberalism but in no way is it more liberal. Quite on the contrary, the thinner values are the easier it is for states, especially powerful ones, to misinterpret and manipulate these and to effectuate thereby *de facto* illiberal outcome. New liberalism brings in more substance to these values. Thus, it is not only status quo (that needs to be preserved) that the new species of liberalism draws its justification from (as is the case with classical liberalism) but also certain progressive vision

⁷⁷ John Charvet and Elisa Kaczynska-Nay, *The Liberal Project and Human Rights: The Theory and Practice of a New World Order* (CUP 2008) 361.

⁷⁸ Gerrit W Gong, 'Standards of Civilization Today' in Mehdi Mozaffari (ed), *Globalization and Civilizations* (Routledge 2002) 80.

⁷⁹ Christopher Hobson, 'Democracy as Civilization' (2008) 22 *Glob Soc* 75, 79. See also Hedley Bull, *The Anarchical Society* (Palgrave Macmillan 1977) 13.

⁸⁰ Gerry Simpson, 'Two Liberalisms' (2001) 12 *EJIL* 537, 556.

⁸¹ Deon Geldenhuys, *Deviant Conduct in World Politics* (Palgrave Macmillan 2004) ch 4.

as to how to build a more just international order. To sum up, to say that the standard of civilisation is inherently negative and should be abandoned is to misinterpret the very history of this concept. The challenge is hence not to make international law immune from any language of civilisation but to ensure that the new standard, by whatever name it is called, is as inclusive as possible to secure legitimacy and efficiency of the contemporary international legal order.

2.3. Global Constitutionalism

In international law it is today of both theoretical and practical importance to distinguish between the international law of 'coexistence', governing essentially diplomatic inter-state relations, and the international law of co-operation, expressed in the growing structure of international organization and the pursuit of common human interests.⁸²

New liberalism, as a theoretical conceptualisation of the modern global order and the principal theoretical framework for this dissertation, encompasses a variety of forms and themes. To varying degrees, the New Haven School,⁸³ the above-discussed liberal IR theory,⁸⁴ neo-Kantianism,⁸⁵ Fukuyama's liberal triumphalism,⁸⁶ Grotian tradition,⁸⁷ democratic entitlement school⁸⁸ and global constitutionalism⁸⁹ are all variations of this new type of liberalism. Each of them acknowledges the importance of global values for effective functioning

⁸² Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia UP 1964) cited in Joel P Trachtman, *The Future of International Law: Global Government* (CUP 2014) 1.

⁸³ While the NHS does not explicitly refer to the process of constitutionalisation of international law, it advances anti-statist and post-Westphalian thesis by reconceptualising subjects of international law and placing lesser emphasis on state consent as a legitimating factor of international lawmaking. See eg Myres S McDougal and W Michael Reisman, 'International Law in Policy-Oriented Perspective' in R St J Macdonald and Douglas M Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (Martinus Nijhoff 1983); Harold D Lasswell and Myres S McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (Kluwer Academic Publishers 1992).

⁸⁴ Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 EJIL 503; Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) 51 Int'l Org 513.

⁸⁵ Fernando Teson, 'The Kantian Theory of International Law' (1992) 92 Colum L Rev 53.

⁸⁶ Francis Fukuyama, *The End of History and the Last Man* (The Free Press 1992).

⁸⁷ Randall Lesaffer, 'The Grotian Tradition Revisited: Change and Continuity in the History of International Law' (2002) 73 BYBIL 103.

⁸⁸ The term 'democratic entitlement school' was coined by Gregory Fox and Brad Roth to designate a strand of scholarly works defending the existence of a human right to democracy. Gregory Fox and Brad Roth, 'Introduction: The Spread of Liberal Democracy and Its Implication for International Law' in Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (CUP 2000) 11-12.

⁸⁹ For a comprehensive account of various dimensions of global constitutionalism, see Christine EJ Schwöbel, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff 2011).

of the international legal system, which has allegedly moved beyond the classical accounts of inter-state relations, and each is based on an idea that individual should take a more prominent role in international legal processes. It is the latter variation of new liberalism, namely global constitutionalism, that this thesis is concerned with. What distinguishes global constitutionalism from other species of new liberalism is its overwhelmingly descriptive (positive), as opposed to prescriptive (normative), character. Thus, whilst a normative agenda of a more efficient and just world order undeniably constitutes one of its themes, global constitutionalism is more concerned with the actual transformations occurring at the heart of international law: it analyses in a descriptive sense these transformations and conceptualises these in a way in which traditional doctrine cannot.

As international legal order is clearly becoming more refined, complex and less dependent on individual state will, a new conceptual basis is needed to understand its operation. The ever-growing inter-connectedness of economies, societies and cultures renders traditional legal theory reflecting classical liberal ideas utterly inadequate. Earlier works focusing on the notion of *jus cogens* and *erga omnes* with an attempt to remedy the rigidity of the conventional normative framework ostensibly failed given the unmanageability of the process through which they come into existence.⁹⁰ Moreover, in Slaughter's terms, distinct behavioural patterns observable between liberal and illiberal states cannot be accommodated within classical international law. She called for a 'new generation of interdisciplinary scholarship [...] to reimagine international law based on an acceptance of this distinction and an extrapolation of its potential implications'.⁹¹ The author of the present thesis contends that global constitutionalism is a theoretical conception that captures, names and explicates the fundamental changes in the international legal order which we are witnessing but cannot adequately comprehend and express in the traditional language of international law. It remedies the main weaknesses of classical liberalism by inviting a richer and more substantive liberalism to the international realm, yet without falling into the trap of hegemonic politics. Global constitutionalism, henceforth, represents the most sophisticated tool for re-visioning international law along neoliberal lines.

Global constitutionalism as a theoretical approach in international law should be distinguished from a more general understanding of constitutionalism in national contexts. Constitutionalism as a domestic doctrine of limited government refers to a set of political values and aspirations

⁹⁰ Jan Klabbers, 'International Legal Positivism and Constitutionalism' in Jörg Kammerhofer and Jean D'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014) 265-66. See also Andrew T Guzman, 'Against Consent' (2012) 52 Va J Int'l L 747, 778.

⁹¹ Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 EJIL 503, 505. Slaughter even called international lawyers realists since akin to realist political scientists they fail to account for other relevant actors in international relations except for states. For her, liberal paradigm represents the best platform for interdisciplinary cooperation. See Anne-Marie Slaughter, 'Law and the Liberal Paradigm in International Relations Theory' (1992) 86 ASIL Proc 180, 180-82.

whose overarching goal is to protect liberty through the establishment of internal and external checks on government power by means of a constitution. It is, thus, a species of political liberalism that emerged in the American and French revolutions in the late eighteenth century.⁹² Global constitutionalism, on the other hand, was borne by major transformations within and of the international legal system since the 1990s, such as globalisation and fragmentation of international law (increasing specialisation within separate legal regimes undermining the unity of international law),⁹³ and geared towards the substantive unity of international law and the rule of law, albeit the idea that there is a constitution that stretches beyond the borders of a single political entity can be found in ancient, medieval and early modern political theories.⁹⁴ While drawing heavily on the domestic doctrine of constitutionalism, global constitutionalism is concerned with the tasks peculiar to the international community, namely maintaining international peace, justice and smooth cooperation between independent political entities. Similarly to national constitutionalism, it seeks to constrain raw power through the imposition of legal limits, such as human rights, democracy and the rule of law. Because there is no international constitution in a formal sense nor the holders of constituent power, some designate global constitutionalism as somewhat ‘lite’,⁹⁵ ‘small-c’⁹⁶ and/or ‘compensatory’⁹⁷ in comparison to constitutionalism within states. Alternatively, one speaks of a mere constitutionalisation as long as international law is concerned, whereas constitutionalism proper only exists on the level of a nation-state,⁹⁸ not to

⁹² Andrew Heywood, *Political Ideologies: An Introduction* (Palgrave Macmillan 2012) 38.

⁹³ Thomas Muller, ‘Global Constitutionalism in Historical Perspective: Towards Refined Tools for International Constitutional Histories’ (2014) 3 *Global Constitutionalism* 71, 72. Some scholars maintain that global constitutionalism has roots in the adoption of the UN Charter. See eg Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff 2009).

⁹⁴ Anthony F Lang and Antje Wiener, ‘A Constitutionalising Global Order: An Introduction’ in Anthony F Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar Publishing 2017) 3, 5-10.

⁹⁵ Jan Klabbbers, ‘Constitutionalism Lite’ (2004) 1 *IOLR* 31.

⁹⁶ Jeffrey L Dunoff and Joel P Trachtman, ‘A Functional Approach to International Constitutionalization’ in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009); Matthias Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State’ in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 260 (‘Small-c constitutionalism appears as little more than legitimating rhetoric for a discipline of international law that is in crisis, after having partially unmoored itself from the first and reliable anchor of state consent’).

⁹⁷ Anne Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’ (2006) 19 *LJIL* 579, 599 (Purposeful constitutionalisation in the global realm compensates for constitutional loss at the national level).

⁹⁸ Rainer Wahl, ‘In Defence of “Constitution”’ in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2010) 221; Dieter Grimm, ‘The Achievement of Constitutionalism and Its Prospects in a Changed World’ in Petra Dobner and Martin Loughlin

mention those for whom the very project of supra-state constitutionalism is utterly ‘impossible’, ‘inconceivable’ and even ‘illegitimate’.⁹⁹ Yet, a more correct approach is to view global constitutionalism as ‘simply different’ by virtue of specific tasks and responsibilities of the international community, which differ from tasks and responsibilities of national governments.¹⁰⁰

There is no single recognised understanding of global constitutionalism. Rather there are many overlapping conceptualisations relating to its objectives,¹⁰¹ nuances and constituting elements,¹⁰² what has been designated by one scholar as a ‘constitutional cacophony’.¹⁰³ On a theoretical level, the debate on global constitutionalism may be situated, *à la* Kleinlein, within two generic groups: on the one hand, scholars may conceptualise developments in international law as an evidence of on-going constitutionalisation. On the other hand, they may transpose the themes of the domestic constitutionalism onto the international plane.¹⁰⁴ On a more specific level, Schwöbel suggested four dimensions of constitutionalism in public international law: social constitutionalism (focusing on coexistence), institutional constitutionalism

(eds), *The Twilight of Constitutionalism?* (OUP 2010) 16 (“‘Constitutionalisation” means a constitution-building process beyond the state”).

⁹⁹ Neil Walker, ‘Taking Constitutionalism Beyond the State’ (2008) 56 *Pol Stud* 519, 520. See also Douglas M Johnston, ‘World Constitutionalism in the Theory of International Law’ in Ronald St John Macdonald and Douglas M Johnston (eds), *Towards World Constitutionalism* (Martinus Nijhoff 2005) 19-20; Oliver Diggelmann and Tilmann Altwicker, ‘Is There Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism’ (2008) 68 *ZaöR* 623, 629-30.

¹⁰⁰ Bardo Fassbender, “‘We the Peoples of the United Nations” Constituent Power and Constitutional Form in International Law’ in Martin Laughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2007) 282.

¹⁰¹ Antje Wiener and others, ‘Global Constitutionalism: Human Rights, Democracy and the Rule of Law’ (2012) 1 *Global Constitutionalism* 1, 8 (Providing for a useful discussion about normative (shaping and constructing) and functionalist (mapping, identifying and explaining) dimensions of global constitutionalism. They argue that ‘the primary dividing line’ between various approaches to global constitutionalism ‘emerges according to their respective answer to the question of whether they consider mapping or shaping the central activity of global constitutionalism’).

¹⁰² For a recent analysis of global constitutionalism’s variations, see Oliver Diggelmann and Tilmann Altwicker, ‘Is There Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism’ (2008) 68 *ZaöRV* 623; Marc Weller, ‘The Struggle for an International Constitutional Order’ in David Armstrong and others (eds), *Routledge Handbook of International Law* (Routledge 2009) 179-94; I de la Rasilla del Moral, ‘The Unsolved Riddle of International Constitutionalism’ (2010) 12 *Int’l CL Rev* 81; Christine E Schwöbel, ‘Situating the Debate on Global Constitutionalism’ (2010) 8 *IJCL* 611; Christine EJ Schwöbel, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff 2011); Thomas Kleinlein, ‘Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law’ (2012) 81 *Nord J Int’l L* 79, 81; Thomas Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (Springer 2012) ch 1; Aoife O’Donoghue, *Constitutionalism in Global Constitutionalisation* (CUP 2014) 140ff.

¹⁰³ Cormac Mac Amhlaigh, ‘Harmonising Global Constitutionalism’ (2016) 5 *Global Constitutionalism* 173, 173.

¹⁰⁴ Thomas Kleinlein, ‘Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law’ (2012) 81 *Nord J Int’l L* 79, 81.

(focusing on governance through institutions), normative constitutionalism (emphasising specific fundamental norms) and analogical constitutionalism (focusing on analogies to domestic and regional constitutionalisms).¹⁰⁵ Significantly, there are other approaches to classification of various academic traditions on global constitutionalism, whose detailed overview is beyond the scope of this thesis.¹⁰⁶

While Schwöbel's four dimensions of global constitutionalism are overlapping in many respects and some of them fall into the both generic camps sketched by Kleinlein, it is nonetheless legitimate to suggest that the understanding of global constitutionalism, as it is conceptualised in the present thesis, mostly aligns with social constitutionalism, albeit not completely subsumed by it, especially considering the fact that it draws heavily on analogical constitutionalism. In a nutshell, 'the international community school',¹⁰⁷ which Schwöbel recognises as one of the themes of social constitutionalism, centres on the idea that international legal system has undergone a transformation from a sovereignty-centred system to a value-oriented or individual-oriented system.¹⁰⁸ This transition is well-captured in the judgments of the World Court, which in its 1986 dictum reaffirmed the conventional position, namely that '[i]n international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise',¹⁰⁹ and in a ten-year time span subscribed to the constitutionalist vision by declaring that '[r]esolutely positivist, voluntarist approach of international law still current at the beginning of the [twentieth] century [had] been replaced by an objective conception of international law, a law more

¹⁰⁵ Christine EJ Schwöbel, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff 2011) 13. See also Olena Sihvo, 'Global Constitutionalism and the Idea of Progress' (2018) 1 HLR 10, 14.

¹⁰⁶ See eg Jeffrey L Dunoff and Joel P Trachtman, 'A Functional Approach to International Constitutionalization' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 9ff (Categorising global constitutionalism into three functional descriptions depending on the purposes of international constitutional norms, which are enabling constitutionalism, constraining constitutionalism and supplemental constitutionalism); Antje Wiener and others, 'Global Constitutionalism: Human Rights, Democracy and the Rule of Law' (2012) 1 Global Constitutionalism 1, 1-5 (Conceptualising global constitutionalism by reference to the idea of three C's: constitution, constitutionalisation and constitutionalism); Surendra Bhandari, *Global Constitutionalism and the Path of International Law* (Brill Nijhoff 2016) 4-5 (Examining the operation of global constitutionalism from normative (concepts and theories) and positive (formative standards and *modus operandi*) benchmarks).

¹⁰⁷ The term was coined by Bardo Fassbender in 'The United Nations Charter as Constitution of the International Community' (1998) 36 Colum J Transnat'l L 546.

¹⁰⁸ See generally Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999) 281 RCADI 21, 237.

¹⁰⁹ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 269.

readily seeking to reflect a collective conscience and respond to the social necessities of states organized as a community'.¹¹⁰

The most comprehensive academic account of the international community school and its impact on the legal doctrine was given by Buchan in his outstanding *International Law and the Construction of the Liberal Peace*. His key point is that following the end of the Cold War, the world order comprises two forms of state association: *international society* based on unqualified membership criteria and ruled by the traditional Westphalian principles of state sovereignty and inviolability of domestic constitutional settings, and *international community* – an exclusive club of liberal constitutional democracies.¹¹¹ Whilst this framework has been characterised by some as overly 'bold', 'premature' and 'reductionist',¹¹² as there are many instances in the post-Cold War era where liberal states have failed to dismiss illiberal states as illegitimate and have even maintained close relationships with them, it neatly captures the *central* patterns of transformations (as opposed to every micro-aspect of international social reality) occurring in international relations since 1990.¹¹³

That said, constitutionalisation of international law is 'the continuing process of the emergence, creation and identification of constitution-like elements in the international legal order'.¹¹⁴ It is 'a process where a legal system goes from an *ad hoc*, decentralised, and consent-based order to a system where the law regulates the exercise of power and governance',¹¹⁵ it is

¹¹⁰ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 268, Declaration of President Bedjaoui, para 13. See also Olena Sihvo, 'Global Constitutionalism and the Idea of Progress' (2018) 1 HLR 10, 14-15.

¹¹¹ Russell Buchan, *International Law and the Construction of the Liberal Peace* (Hart Publishing 2013) 19. See also Russell Buchan, 'A Clash of Normativities: International Society and International Community' (2008) 10 Int'l CL Rev 3; Russell Buchan, 'Developing Democracy through Liberal International Law' (2015) 4 CJICL 319. For a similar division of international social intercourse, see Bruno Simma and Andreas L Paulus, 'The "International Community": Facing the Challenge of Globalization' (1998) 9 EJIL 266, 269-71; Santiago Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law' (2010) 21 EJIL 387, 391-92.

¹¹² Brad Roth, 'International Law's Enemy Within: Buchan's "International Community" as Rival to the Positive Legal Order' *EJIL: Talk!* (17 November 2014) <<https://www.ejiltalk.org/international-laws-enemy-within-buchans-international-community-as-rival-to-the-positive-legal-order/>> accessed 28 March 2017; Gregory Fox, 'A Comment on Russell Buchan's "International Law and the Construction of the Liberal Peace"' *EJIL: Talk!* (18 November 2014) <<https://www.ejiltalk.org/a-comment-on-russell-buchans-international-law-and-the-construction-of-the-liberal-peace/>> accessed 28 March 2017. For a general criticism of the international community thesis, see Pierre Hassner, *La revanche des passions: Métamorphoses de la violence et crises du politique* (Fayard 2015).

¹¹³ Russell Buchan, 'Developing Democracy through Liberal International Law' (2015) 4 CJICL 319, 325. See also Olena Sihvo, 'Global Constitutionalism and the Idea of Progress' (2018) 1 HLR 10, 14.

¹¹⁴ Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 LJIL 579, 582.

¹¹⁵ Aoife O'Donoghue, 'International Constitutionalism and the State' (2013) 11 ICON 1021, 1028.

‘a process by which international law moves beyond its sovereign foundations as well as its vertical and Western bias, to a system of law founded on a process that is hierarchal, normative and structured’.¹¹⁶ It is hence a process where international organisations and international legal norms become increasingly salient in global politics. In more concrete terms, Westphalian, horizontal, consent-based model of international relations, pinned on an idea that states are sole subjects and makers of international law, is being incrementally supplanted by a new constitutional world order, resting on three fundamental pillars: limited government (democracy), human rights and the rule of law — what has been called as ‘the trinitarian mantra of the constitutionalist faith’.¹¹⁷ The key rationale behind such a shift is that the international system can no longer be viewed as a mere coexistence of states governing their relations by a set of pre-agreed ‘coordination’ rules. Rather, it is increasingly complex and overarching system of rules and principles regulating various areas of life. On this account, international law, apart from being a compilation of rules explicitly sanctioned by states, includes values and principles, or ‘common interest’, which do not derive solely from individual state *consent* but also from overall *consensus* of the international community as a whole. In other words, this means an increasing autonomy of international law vis-à-vis individual states and consolidation of universal values, which no individual state will can override. As Bryde has aptly maintained, constitutionalist system of international law ‘recognises the source of legitimacy that is higher than individual states, a hierarchy of norms in which ordinary legal rules have to be reviewed against constitutional principles, and it employs constitutionalist methods of interpretation’.¹¹⁸

Thus, international law as a unified system enjoys considerable political legitimacy because it is pinned on widely shared liberal values, such as the rule of law, human rights and democratic form of government. This necessarily implies that international law cares about domestic constitutional standards. Importantly, democracy has not historically been a *sine qua non* of constitutionalism, since history abounds with examples where states were constitutional without being fully democratic, such as the nineteenth-century UK with its restrictions on female political participation. However, as one

¹¹⁶ Aoife O’Donoghue, *Constitutionalism in Global Constitutionalisation* (CUP 2014) 50.

¹¹⁷ Mattias Kumm and others, ‘How Large is the World of Global Constitutionalism?’ (2014) 3 *Global Constitutionalism* 1, 3. See also Andreas L Paulus, ‘The International Legal System as a Constitution’ in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 71 (Typical substantive elements of a constitution in the Western tradition as ‘yardsticks for a constitutional understanding of the international legal order’, are democracy, the rule of law, the separation of powers as well as fundamental rights of legal subjects); Anthony F Lang and Antje Wiener, ‘A Constitutionalising Global Order: An Introduction’ in Anthony F Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar Publishing 2017) 1, 10-14 (Opining that ‘core constitutional norms’ are ‘the rule of law, separation of powers, and human rights’).

¹¹⁸ Brun-Otto Bryde, ‘International Democratic Constitutionalism’ in Ronald St John Macdonald and Douglas M Johnston (eds), *Towards World Constitutionalism* (Martinus Nijhoff 2005) 106.

prominent scholar suggested, the absence of a fully operational democratic structure is ‘a historically primitive understanding of constitutionalism’.¹¹⁹ Since 1990, no constitution has been enacted that does not pledge allegiance to democracy.¹²⁰ Constitutionalism and democratic legitimacy go hand in hand, because the latter maintains the link between constituent and constituted power holders.¹²¹ While the notions of constituent and constituted powers are not bound to be easily transplanted to the realm of international relations, since the holders of constituent power are still to be identified, it is fair to suggest that individuals residing within states can be viewed as such. If states are domestically organised according to democratic principles, then they are more reflective of the will of their citizens on the international plane. Such understanding of international constituency as based upon domestic democratic participation may serve as an important legitimating base for the concept of the international community.

As regards the analogical dimension of global constitutionalism, as developed in this thesis, it is suggested that the concept of global constitutionalism has its roots in the domestic doctrine of *political* constitutionalism which is, in turn, characterised by legislative supremacy and by an idea that the constitution is not a rigid framework of fundamental laws, as the advocates of *legal* constitutionalism maintain, but a political process which is mostly associated with lawmaking rather than judicial practice.¹²² Applied to the international level, political constitutionalism implies holding those who exercise political power (e.g., states) to account, by and large, through political processes and institutions rather than through judicial review, as propagated by legal constitutionalism. Moreover, the vision of constitutionalism employed in this thesis does not presuppose the existence of international constitution embodied in, say, the UN Charter and other texts of ‘constitutional’ significance, but it is rather pinned on the existence of global (constitutional) values, which are shaped and enforced by the world community through a variety of political processes, such as, *inter alia*, membership criteria in the international organisations, recognition practices, development policies and sanctions for non-compliance and interpretative

¹¹⁹ Aoife O’Donoghue, *Constitutionalism in Global Constitutionalisation* (CUP 2014) 40.

¹²⁰ Mattias Kumm and others, ‘How Large is the World of Global Constitutionalism?’ (2014) 3 *Global Constitutionalism* 1, 4.

¹²¹ Aoife O’Donoghue, *Constitutionalism in Global Constitutionalisation* (CUP 2014) 43.

¹²² For discussions on political constitutionalism, see Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007). See also Graham Gee and Gregoire Webber, ‘What is a Political Constitution?’ (2010) 30 *OJLS* 273; Richard Bellamy, ‘Political Constitutionalism and the Human Rights Act’ (2011) 9 *IJCL* 86; Marco Goldoni, ‘Constitutional Reasoning According to Political Constitutionalism: Comment on Richard Bellamy’ (2013) 14 *Germ LJ* 1053. For other major contributions to the theory of political constitutionalism, see JAG Griffith, ‘The Political Constitutionalism’ (1979) 42 *MLR* 1; Jeremy Waldron, *Law and Disagreement* (OUP 1999); Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005); Gregoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (CUP 2009); Keith Ewing, *The Bonfire of Liberties* (OUP 2010).

techniques, including, among others, evolutionary interpretation of treaties and the redefinition of the doctrine of custom. Hence, the main thrust of the idea of global constitutionalism as a derivative of political constitutionalism lies in the wide discretion of international actors as to how to go on political decisions but within 'thin' parameters set by global constitutional principles. In this sense, global constitutionalism exists independent of a constitution. Moreover, the normativity, and therefore naturalist fervour, of global constitutionalism as interpreted along political constitutionalism's lines is minimal, and thus compatible with the principle of state sovereignty, as it does not prescribe more than that it is for states as representatives of the international community to decide on how to live up to these principles. However, to say that the normativity of global constitutionalism as a sub-species of political constitutionalism is minimal is not to say that it is utterly absent or should be absent. A certain core of normative principles is essential for global constitutionalism to retain its role as a check on states' self-interested actions. It means that global constitutionalism draws heavily on a *normative* version of political constitutionalism, as developed by Tomkins and Bellamy, rather than a descriptive one which defines constitutionalism as a mere political process stripped of any prescriptive overtones.¹²³ The idea that global constitutionalism resembles the domestic doctrine of political constitutionalism, particularly the British experience, is also shared by O'Donoghue who contends that the common feature of the two constitutionalisms is the fact that while the outer limits of constitutional project are blurred, the day-to-day process of its operation is clear.¹²⁴ It should be kept in mind, however, that the above division between social and analogical constitutionalisms is by essence an artificial one since all visions of world constitutionalism are heavily influenced by the domestic constitutionalist theory.

On a final note, it is of import to highlight that global constitutionalism, as the concept is treated in the present work, is a positive doctrine. It means that it captures, maps and conceptualises ongoing behavioural patterns of states and other subjects of international law without seeking (or to be more precise, seeking to a very limited extent) to lay down normative requirements as to the desired course of development of the international legal system. In this sense, it stands for an analytical tool to describe structural changes and developments in international law and provides for a conceptual vocabulary to phenomena which the traditional doctrine is not capable to conceptually accommodate. The

¹²³ The descriptive account of political constitutionalism is well illustrated in the works of Griffith. See JAG Griffith, 'The Political Constitution' (1979) 42 MLR 1, 19 (Britain's constitution 'lives on, changing from day to day for the constitution is no more no less than what happens. Everything what happens is constitutional. And if nothing happened that would be constitutional also'). The normative turn in the theory of political constitutionalism was spearheaded by Adam Tomkins and Richard Bellamy. Tomkins has identified non-domination, popular sovereignty, equality, open government and civic virtue (basic norms of republican theory) as the basic norms that inform and underpin the idea of a political constitution. Graham Gee and Gregoire CN Webber, 'What is a Political Constitution' (2010) 30 OJLS 273, 282.

¹²⁴ Aoife O'Donoghue, *Constitutionalism in Global Constitutionalisation* (CUP 2014) 238.

positive nature of global constitutionalism is underscored, for instance, by Werner who contends that '[i]nternational constitutionalism seeks to explain certain developments in international law in terms that deviate from a purely consensualist understanding of the international legal order'.¹²⁵ Similarly, Bhandari posits that 'global constitutionalism operates at the positive rather than normative level, being distinguished by the formative features [legitimacy, authority and validity] and operational aspects [unity, harmony, legalisation, convergence and supremacy]'.¹²⁶ Global constitutionalism is therefore a theoretical framework which sees constitutionalism as a description and explanation of how international legal and political order is changing.

That global constitutionalisation is an empirical process rather than academic artefact is well illustrated by such fundamental changes within and of international law as, for example, relocation of authority to international and regional organisations, such as the UN and the EU, with increasingly majoritarian decision-making procedures; vertical differentiation (or hierarchisation) between different norms and principles of international law (emergence of *jus cogens* and *erga omnes* obligations); increasing legalisation and juridification of dispute settlement through the establishment of the international courts and tribunals; ever-frequent adoption of multilateral treaties (with third-party effects) delineating universal values, such as human rights protection, climate protection, sustainable development and free trade, whose non-ratification and/or non-observance entail high reputational costs; reduced threshold for the emergence of international custom in terms of state practice and/or *opinio juris*, particularly when fundamental values are concerned; changes in the concept of statehood entailing the shift from the principle of effectiveness to standards of legitimacy in the question of recognition of states and governments; and rebalancing of moral primacy between rights of states (e.g. sovereignty and non-intervention) and rights of individuals (human rights) in the debates on the external (e.g. humanitarian intervention) and internal use of force (e.g. revolution).¹²⁷

Notwithstanding the robust empirical evidence of global constitutionalisation and the fact that empirical findings made by virtue of global constitutionalism are barely disputed by most international lawyers, interpretation of international law through constitutionalist lens has been criticised as wishful thinking and a hybrid enterprise resting on diametrically opposing theoretical assumptions. It has been said that the coexistence of

¹²⁵ Wouter Werner, 'The Never-Ending Closure: Constitutionalism and International Law' in Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (CUP 2007) 340. Cf Anne Peters, 'The Merits of Global Constitutionalism' (2009) 16 *Ind J Global LS* 397, 397-98 ('Global constitutionalism is an academic and political agenda that identifies and advocates for the application of constitutionalist principles in the international legal sphere in order to improve the effectiveness and the fairness of the international legal order').

¹²⁶ Surenda Bhandari, *Global Constitutionalism and the Path of International Law* (Brill Nijhoff 2016) 6.

¹²⁷ Olena Sihvo, 'Global Constitutionalism and the Idea of Progress' (2018) 1 *HLR* 10, 15.

normative and descriptive dimensions within global constitutionalism contributes to the hybridity of such an approach and makes it inevitably torn by dilemmas.¹²⁸ Even if the conceptual soundness of global constitutionalism as a legal approach could be defended, the constitutionalist argument is premised on the progressive reading of history, arguably appropriated and controlled by hegemonic powers who possess military capacity and economic resources to impose their understanding of ‘progress’ upon the weak and thereby to marginalise and disqualify alternative narratives. In what follows, global constitutionalism’s paradoxical nature will be demystified (section 2.3.1) and its progress agenda revisited (section 2.3.2).

2.3.1. Squaring the Circle: Reconciling Apology and Utopia

Global constitutionalism as a legal approach undoubtedly has a sort of naturalist savour as it propagates the existence of constitutional principles binding on states without or against their will. Indeed, the very fact that constitutionalism questions positive law underpinnings by invoking ‘natural’ principles of limited power, checks and balances and democracy (when they are not enshrined in positive law) warms up an idea that the whole tradition of constitutionalism is but naturalism in disguise. It is, in effect, the principal point of criticism that global constitutionalism attracts from its opponents. For instance, positivists insist that constitutionalism is an unworkable theory of international law as it is overly ambitious, even disingenuous, not backed up by state practice and might lead to normative over-extension because its formal categories are said to be derived from global values.¹²⁹ On this view, global constitutionalism is equated to a set of normative standards which, albeit having its own beauty and value as a concept and academic theory, lacks legitimacy, authority and validity — the principal characteristics of positivity. Similar objection is raised by legal and political realists who maintain that constitutionalism naively purports to direct and control social reality independently from the interplay of power structures and is, thus, irrelevant to a proper understanding of international politics.¹³⁰

Yet, is often overlooked that global constitutionalism’s central objective is mapping and explicating a changing legal and political milieu without

¹²⁸ Johannes Gerald Van Mulligen, ‘Global Constitutionalism and the Objective Purport of the International Legal Order’ (2011) 24 LJIL 277, 278-79.

¹²⁹ Armin von Bogdandy, ‘Constitutionalism in International Law: Comment on a Proposal from Germany’ (2006) 47 Harv Int’l LJ 223, 242; Vlad F Perju, ‘Cosmopolitan Constitutional Law’ (2013) 35 Cardozo L Rev 711, 711.

¹³⁰ Anne Peters, ‘The Merits of Global Constitutionalism’ (2009) 16 Ind J Global LS 397, 401; Jean d’Aspremont, ‘International Legal Constitutionalism, Legal Forms and the Need for Villains’ in Anthony F Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar Publishing 2017) 156 (‘[C]onstitutionalism-bashing scholarship dramatically outweighs literature promoting constitutionalist thinking’). See also Henry Kissinger, *World Order* (Penguin 2014) 2 (Denying the existence of a truly global world order).

blurring the distinction between law ‘as it is’ and law ‘as it ought to be’. Certainly, such mapping activity is adjoined by the desideratum to reform the political community into legal community from a clear normative preference: ‘[T]he furtherance of legal unity, international integration and fundamental rights, and anti-nationalistic understanding of sovereignty, a relaxation of the requirement of state consent and the regulation of political power through legal institutions’.¹³¹ These principles are not, however, purely naturalist artefacts. They originate from state practice and *opinio juris*. The fact that they might be at times irreconcilable with state will does not mean that such norms are ‘given’ or ‘imposed’ from outside the legal system. Once the principles emerge, they are constantly under state scrutiny as they are discussed and criticised by the international community in concrete cases.¹³² Moreover, international law is not amoral, as many scholars tend to suggest. It is not unfair to claim that international law has historically been sensitive to moral issues, such as slavery, genocide, humanitarian concerns and human rights, to name but a few. Thus, the sole fact that international law mirrors certain universal values, such as, in the present case, democracy and the rule of law, does not necessarily make it utopian and, therefore, political. These values, enshrined in some way or another into the corpus of positive law, constitute the common heritage of mankind.¹³³

It follows, therefore, that constitutionalism has much in common with positivist school of thought as well. Traditional international law derives its legitimacy and binding force from state consent: states can only be bound by norms they consented to, either explicitly or tacitly. Be that as it may, rigid voluntarism may be untenable in globalised and ever-interdependent international community. It allows states to reject the binding character of putative obligations that may be desirable; ‘it allows for “free riding”’; it allows for “holding out” or “holding others hostage”, all to the detriment of the global order’.¹³⁴ Hence, constitutionalism can be deemed to be firmly embedded in positivist thinking as consent is still considered to be a primary validating factor unless it frustrates the achievement of community interest.¹³⁵ Likewise, Anne Peters postulates that albeit constitutionalism is a ‘value-loaded concept’, it does not cease to be a legal (positive) approach based on the consideration of predictability, legal stability and legality and, therefore,

¹³¹ Wouter Werner, ‘The Never Ending Closure: Constitutionalism and International Law’ in Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (CUP 2009) 330.

¹³² Vaughan Lowe, ‘Book Review: “From Apology to Utopia: The Structure of International Legal Argument” by Martti Koskenniemi’ (1990) 17 JL & Soc 384, 387.

¹³³ See Pierre-Marie Dupuy, ‘Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi’ (2005) 16 EJIL 131, 135; Ciaran Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013) 328.

¹³⁴ Jan Klabbers, ‘International Legal Positivism and Constitutionalism’ in Jörg Kammerhofer and Jean d’Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014) 284.

¹³⁵ *ibid* 285.

geometrically opposed to ‘moralizing *tout court*’.¹³⁶ In this sense, constitutionalism stands in stark contrast to bold naturalism, or what Koskenniemi called ‘turn to ethics’,¹³⁷ as the way it incorporates global values in international system is compatible with the regime of traditional sources and with the formal rule of law.¹³⁸ By the same token, d’Aspremont reiterates that constitutionalist theory remains consistent with the formalism advocated in mainstream legal scholarship. On this account, not only global constitutionalism abstains from questioning the formal law-ascertainment system as a foundation of international law identification, but it also reinforces the doctrine of sources by attempting to tame the perception of state centrism in international lawmaking.¹³⁹ Further, universal principles on which the idea of constitutionalism is based, such as the separation of powers, the rule of law, democracy and human rights, can be empirically validated by referring to various international instruments, either ‘hard’ or ‘soft’. Klabbbers has succinctly observed in this respect:

It is difficult to see how a constitutional order can be non-positive: appeals to faith, *recta ratio*, the actual compliance with norms or legitimacy are too open-ended to serve, and holding actors accountable *ex post facto* without there being clarity as to what is expected of them seems difficult to reconcile with the principle of legality, which must be considered one of the core notions of any constitutional order. Hence, constitutionalism and positivism need to go hand in hand.¹⁴⁰

As the foregoing makes clear, global constitutionalism lies at the intersection of positivist and naturalist dichotomy and is, indeed, often characterised by international constitutionalists as both normative (natural) and descriptive (positive).¹⁴¹ It is normative inasmuch as it was developed by scholarly community to further efficiency, coherency and legitimacy of international law by applying domestic constitutional theories to the international domain. It is positive to the extent that it serves as an analytical tool to describe ongoing

¹³⁶ Anne Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’ (2006) 19 LJIL 579, 610.

¹³⁷ Martti Koskenniemi, ‘“The Lady Doth Protest Too Much”: Kosovo, and the Turn to Ethics in International Law’ (2002) 65 MLR 159.

¹³⁸ Thomas Kleinlein, ‘Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law’ (2012) 81 Nord J Int’l L 79, 91.

¹³⁹ Jean d’Aspremont, *Formalism and the Sources of International Law: A Theories of the Ascertainment of Legal Rules* (OUP 2011) 81.

¹⁴⁰ Jan Klabbbers, ‘International Legal Positivism and Constitutionalism’ in Jörg Kammerhofer and Jean d’Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014) 283-84.

¹⁴¹ Christian Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law’ (1999) 281 RCADI 21, 48-49; Thomas Cottier and Maya Hertig, ‘The Prospects of 21st Century Constitutionalism’ (2003) 7 Max Planck YB UN L 261, 271; Richard Collins, ‘Constitutionalism as Liberal-Juridical Consciousness: Echoes from International Law’s Past’ (2009) 22 LJIL 251, 266.

process of restructuring the international legal system and is grounded in constructions traditionally found in legal positivism.

However, such reliance on both positive and normative nature of global constitutionalism — ‘rejecting the legitimacy of any change which has not been willed into existence, but recognizing that reliance on will undermines the substance of the developments under way’ — is bound to be controversial and fraught with theoretical ambiguities.¹⁴² On a more general level, the works of Koskenniemi well reflect the ongoing naturalist/positivist tension in legal theory. For him, if law is only what states say and do, it becomes an apology for the interests of the powerful and if, on the contrary, law sets normative standards to put limits on raw state power, it becomes utopian. On both accounts, law taps into politics for it cannot be concrete and normative at the same time.¹⁴³ Constitutionalism, as he has pointed out, is but one of many strategies which modern international lawyers have taken to prove the relevance of international law in terms of its normativity (contra-facticity) and concreteness (congruence with state practice).¹⁴⁴ However, he insists that international argument (or theory) cannot be both concrete (positive) and normative (natural) since ‘the closer to state practice an argument is, the less normative [...] it seems’¹⁴⁵ and *vice versa*. It basically means that Koskenniemi is sceptical about the feasibility of a legal theory to be responsive to both positivist and naturalist criticisms.

Klabber’s response to this dilemma is simplex but prodigious. He submitted that the reconciliation between positivism and naturalism is not a ‘mission impossible’. To this end, he proposed a presumptive approach, which represents a pragmatic rapprochement between natural and positive legal traditions, both of which serve as theoretical foundations for constitutionalist thought. It presupposes that whatever states purportedly do to regulate their relations must be presumed to be law unless it can be objectively counterclaimed. While the *Lotus* case¹⁴⁶ embodies the system where international law was presumed to be non-existent, the presumptive approach merely reverses this presumption.¹⁴⁷ The approach in question might seem overtly simplistic and lacking necessary nuances but it succinctly displays a need for an adequate doctrine incorporating traditional sources of legality and

¹⁴² Richard Collins, ‘Constitutionalism as Liberal-Juridical Consciousness: Echoes from International Law’s Past’ (2009) 22 LJIL 251, 266-67. See also Johannes Gerald Van Mulligen, ‘Global Constitutionalism and the Objective Purport of the International Legal Order’ (2011) 24 LJIL 277, 279 (Arguing that the ‘foundational problem’ of global constitutionalism lies in its hybrid character: its normative agenda and its grounding in positive law).

¹⁴³ Martti Koskenniemi, ‘The Politics of International Law’ (1990) 1 EJIL 4, 7-8. See generally Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005).

¹⁴⁴ Martti Koskenniemi, ‘The Politics of International Law’ (1990) 1 EJIL 4, 9-10.

¹⁴⁵ *ibid* 8.

¹⁴⁶ *The Case of the S.S. ‘Lotus’ (France v Turkey)* (Merits) [1927] PCIJ Series A No 10.

¹⁴⁷ Jan Klabbers, ‘International Legal Positivism and Constitutionalism’ in Jörg Kammerhofer and Jean d’Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014) 286.

pleas for the ‘culture of formalism’¹⁴⁸ as well as concerns over law’s autonomy and normativity.

To respond to Koskeniemi’s critique and to fine-tune Klabber’s presumptive approach, it may be argued that constitutionalism combines both utopian and apologist concerns without tapping into either thereof. It is not utopian to the extent that it is based on the consent of states, at least implicitly, to incorporate certain global concerns which individual states are not capable to address on their own into the fabric of international law. To illustrate, general principles of international law, serving as the main repositories of universal values, are codified in the ICJ Statute as one of the sources of international law, and thus binding on all states. It goes without saying that considering the solid legal foundation of these principles, one cannot possibly call them utopian, imagined, abstract or by any other naturalist qualifier. On the second account, constitutionalism is not apologetic either for whenever constitutionalist values are couched in legally binding form, they are not easy to change by whim and whimsy of individual states. This middle-ground quality of global constitutionalism, as the one ‘aim[ing] to bring about what it describes as existing’,¹⁴⁹ has been designated by scholars as ‘hybrid’¹⁵⁰ and even ‘paradoxical’.¹⁵¹ However, this depends on what approach one takes to the notion of ‘objective values’. If one holds global values to be metaphysically objective, agent-neutral things ‘out there’, then the paradox thesis is sustainable. Global constitutionalism, contrastively, reposes on a more agent-relative understanding of values, namely values consented to by the community of states (as they are embedded in the architecture of the international legal order). That such consent may at times be implicit does not change the agent-relative nature of these values. Yet, such ‘minimalist’ values are to be distinguished from pure individual state interests for they ‘derive from deliberation based on *idealised* (counterfactual) circumstances of complete knowledge and rationality, rather than being merely based on deliberation in actual circumstances’.¹⁵²

Such a subtle approach to the notion of ‘objectivity’ as a central element of the law’s normativity seems to have also been embraced by post-modern positivists. Whilst militating against mechanical and unreflective rejection of (classical) legal positivism, the adherents of post-modern legal positivism, also

¹⁴⁸ The expression is from Martti Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2nd edn, CUP 2004) 502-09.

¹⁴⁹ Wouter Werner, ‘The Never Ending Closure: Constitutionalism and International Law’ in Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (CUP 2009) 348.

¹⁵⁰ Johannes Gerald Van Mulligen, ‘Global Constitutionalism and the Objective Purport of the International Legal Order’ (2011) 24 LJIL 277, 288.

¹⁵¹ Bardo Fassbender in ‘The United Nations Charter as Constitution of the International Community’ (1998) 36 Colum J Transnat’l L 546, 552.

¹⁵² Johannes Gerald Van Mulligen, ‘Global Constitutionalism and the Objective Purport of the International Legal Order’ (2011) 24 LJIL 277, 298.

known as ‘enlightened positivism’,¹⁵³ ‘progressive positivism’¹⁵⁴ and ‘normative positivism’,¹⁵⁵ celebrate the role of politics in international law and offer a more sophisticated vision of legal validity that can embrace non-consensual and even constitutional norms, ‘whose validation hinges on the recipient epistemic community’.¹⁵⁶

In the upshot, today’s international law cannot effectively regulate manifold issues of globalised community unless it distances itself from positivistic straitjacket without falling into naturalist utopianism. Global constitutionalism has both naturalist and positivist roots: it is inspired by the former and cannot be effective without the latter. It means that it is neither a lofty discourse *de lege ferenda* nor an apologetic alignment with the actions of powerful states. It transcends this binary dilemma by being both and neither at the same time. It adds shade and texture to existing black and white approaches to law to secure their effectiveness and theoretical consistency. Global constitutionalism is thus a modern legal approach shaped by the needs of the globalised community ‘that maintains the distinctiveness of the legal order while managing to be responsive to the extralegal settings of politics, history and morality’.¹⁵⁷ In this sense, descriptive and normative aspects of global constitutionalism are mutually reinforcing.

2.3.2. Global Constitutionalism and the Idea of Progress

The idea of international law marching towards a more constitutionalised framework inevitably implies a teleological and linear reading of the history of international law, global constitutionalism being at the apex thereof. By depicting the present state of international law as being in the ‘process of constitutionalisation’ — a process where a legal system goes from a decentralised and consent-predicated order to a system of an ‘enhanced

¹⁵³ Armin von Bogdandy, ‘Constitutionalism in International Law: Comment on a Proposal from Germany’ (2006) 47 Harv Int’l LJ 223, 227.

¹⁵⁴ Wouter Werner, ‘The Never Ending Closure: Constitutionalism and International Law’ in Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (CUP 2009) 330.

¹⁵⁵ See Jeremy Waldron, ‘Normative (or Ethical) Positivism’ in Jules Coleman (ed), *Hart’s Postscript: Essay on the Postscript to the Concept of Law* (OUP 2001) 410-33; Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (OUP 2010) 21. Cf Deryck Beyleveld and Roger Brownsword, ‘Normative Positivism: The Mirage of the Middle-Way’ (1989) 9 OJLS 463.

¹⁵⁶ See Jean d’Aspremont and Jörg Kammerhofer, ‘The Future of International Legal Positivism’ in Jörg Kammerhofer and Jean d’Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014) 4-7.

¹⁵⁷ Richard Falk, ‘The Interplay of Westphalia and Charter Conceptions of the International Legal Order’ in Richard Falk and Cyril Black (eds), *The Future of the International Legal Order* (Princeton UP 1969) 34-35.

constitutional quality’¹⁵⁸ — global constitutionalism automatically implies its progressive nature with respect to the ‘pre-constitutionalised’ order. In intellectual history, the term ‘progress’ signifies a constant improvement from a primitive, ‘barbarian’ past towards an enlightened future of rationality and peace.¹⁵⁹ It consists of three elements: (1) comparative, which means that progress can only be identified by way of comparison with a more inferior state; (2) evaluative, in that it necessarily scrutinises the past on the presence of the signs of progress (or, more precisely, on the absence thereof); and (3) reformative, that is by equating itself to anything but goodness progress inevitably assumes a reformist ‘punch’.¹⁶⁰

Indeed, the promise of progress lies at the very centre of the constitutionalist epistemology. From the vantage point of global constitutionalism, the world has been growing irreversibly more interdependent and, as a result, the global order has evolved from the system of co-existence to the framework of cooperation to a comprehensive ‘blueprint for social life’ and ultimately to international law of the international community.¹⁶¹ However, the language of progress is not without dark sides. It may legitimise imperial politics and shift alternative narratives to the periphery. There is a danger of complacency with regard to the dominant idea and the attendant risk of this idea remaining unaltered irrespective of its efficiency and legitimacy. Another criticism centres on the progress narrative’s hopelessly idealistic depiction of the world, which obscures the fact that ‘never have violence, inequality, exclusion and famine, and thus economic oppression affected as many human beings in the history of the earth and humanity’.¹⁶² A further flaw of progressivism is its simplistic interpretation of historical change. It overstates the predictability of history and fails to appreciate the contingency of events.¹⁶³

Importantly, the idea of progress is not an exclusive feature of global constitutionalism. It also animates mainstream legal scholarship. Almost every book on general international law in its introductory chapters presents historical events that are situated at specific coordinates in space and in time as a coherent story of progress: ‘[F]rom Westphalia in 1648 through Bretton Woods and San Francisco conferences of 1944 and 1945 to the present day and

¹⁵⁸ Antje Wiener and others, ‘Global Constitutionalism: Human Rights, Democracy and the Rule of Law’ (2012) 1 *Global Constitutionalism* 1, 8.

¹⁵⁹ Russell A Miller and Rebecca M Bratspies (eds), *Progress in International Law* (Martinus Nijhoff 2008) 22. See also Nathan Rotenstreich, ‘The Idea of Historical Progress and Its Assumptions’ (1971) 10 *Hist & Theor* 197, 197.

¹⁶⁰ Olena Sihvo, ‘Global Constitutionalism and the Idea of Progress’ (2018) 1 *HLR* 10, 18.

¹⁶¹ Christian Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law’ (1999) 281 *RCADI* 21, 56-88.

¹⁶² Jacques Derrida, *Specters of Marx* (Routledge 2006) 106.

¹⁶³ Samuel Huntington, ‘No Exit: The Errors of Endism’ *The National Interest* (Fall 1989) 10 <http://www.wesjones.com/eoh_noexit.htm> accessed 24 August 2016; David Held, ‘Liberalism, Marxism and Democracy’ (1993) 22 *Theor & Soc* 283, 296-97; Susan Marks, ‘The End of History? Reflections on Some International Legal Theses’ (1997) 3 *EJIL* 449, 458.

beyond to a more just world'.¹⁶⁴ The idea that international law is constantly moving towards a more perfected state has ancient roots. In the Christian tradition, history was viewed as following a linear and directional path to some ideal future. Such progress narrative stood in stark contrast with pagan cyclical histories of natural birth, development, decline and regeneration.¹⁶⁵ In the modern times marked by fast scientific, technological and social change, this teleological approach to history took on the secular form and became the dominant paradigm of the philosophical history of international law. It is clearly discernible in the works of one of the prominent Enlightenment scholars who contended that

The history of the human race as a whole can be regarded as a realization of a hidden plan of nature to bring about an internally — and for this purpose also externally — perfect political constitution as the only possible state within which all natural capabilities of mankind can be developed completely.¹⁶⁶

The naturalist appeal to universal moral principles as a common strategy of many Enlightenment scholars to reform international law was subsequently attacked for its subjectivity and fuzziness and supplanted by an ostensibly objective discourse of the progressive development partially based on thin empirical evidence.¹⁶⁷ Hudson's work *Progress in International Organization*, which treats the growth of international organisations as an embodiment of progress, is one of the most cited in this respect.¹⁶⁸ For him as well as for the succeeding generations of international lawyers, 'the notion that international law serves as the ordained mechanism for the achievement of "progress" was an accepted tenet of the faith'.¹⁶⁹

Thus, modern progress narratives are constructed, *à la* Altwicker and Diggelman, by means of four 'techniques': (1) ascending periodisation, (2) proving increased value-orientation of international law, (3) detection of positive trends and (4) paradigm shift-talk.¹⁷⁰ On this account, global constitutionalism is a second technique: by suggesting that international law is evolving from Westphalian, anarchic model of international relations pinned

¹⁶⁴ David Koller, '... and New York and The Hague and Tokyo and Geneva and Nuremberg and... The Geographies of International Law' (2012) 23 EJIL 97, 98.

¹⁶⁵ See Nathan Rotenstreich, 'The Idea of Progress and Its Assumptions' (1971) 10 Hist & Theor 197, 200; John Burrow, *A History of Histories: Epics, Chronicles, Romances and Inquiries from Herodotus and Thucydides to the Twentieth Century* (Penguin 2009) 68-69.

¹⁶⁶ Immanuel Kant, 'Idea for a Universal History with a Cosmopolitan Purpose' in HS Reiss (ed), *Kant's Political Writings* (2nd edn, CUP 1990) 41, 50.

¹⁶⁷ David Koller, '... and New York and The Hague and Tokyo and Geneva and Nuremberg and... The Geographies of International Law' (2012) 23 EJIL 97, 102.

¹⁶⁸ Manley O Hudson, *Progress in International Organization* (Stanford UP 1932).

¹⁶⁹ Russell A Miller and Rebecca M Bratspies (eds), *Progress in International Law* (Martinus Nijhoff 2008) 21-22. See also Olena Sihvo, 'Global Constitutionalism and the Idea of Progress' (2018) 1 HLR 10, 18-19.

¹⁷⁰ Tilmann Altwicker and Oliver Diggelmann, 'How is Progress Constructed in International Legal Scholarship?' (2014) 25 EJIL 425, 432-37.

on an idea of sovereignty to a new constitutional world order founded on common interest, it asserts the progress by pointing to the growing value-orientation of international law. Traditional international law too may (and it actually does) employ this technique to convey the message of progress but in a less pronounced manner. In fact, the idea of progress is so imminent to international law's self-perception as a discipline that it became a dominant narrative of the field.¹⁷¹ The difference that global constitutionalism has introduced is that it brought this discourse into light, made it explicit, whereas orthodox international theory attempts to contain the progress narrative underground, behind a veil of objective reasoning and impartial argumentative techniques.

So, is the progress narrative inherently fallacious? Is it avoidable? Should it be avoided? Thinking in terms of progress is not intrinsically erroneous. It is when one constructs a progress narrative and uncritically assembles historical facts to match the plot in order to design a particular future that one enters dangerous waters of subjectivism, idealism and politics of alienation. As Skouteris observed, the language of progress is a language of authority which can legitimise but also de-legitimise.¹⁷² By designing an ostensibly true version of history, it proclaims in a celebratory tone an end to contestation and thus sets aside alternative narratives. Hence, progress discourse is not a descriptive exercise but a 'powerful rhetorical strategy of legitimation'.¹⁷³

Be that as it may, a strong claim may be advanced that any theory of international law shall incorporate the idea of progress to be operative, that is to provide for practical solutions to every-day legal problems. In fact, this is the main reason why almost every modern theory of international law is built on the idea of progressive history. However, there is a strand of legal scholarship that emerged as a counter-narrative to the prevailing linear understanding of historical change.¹⁷⁴ This counter-narrative, or what has become to be known as critical legal studies,¹⁷⁵ rejects the idea of law as linear progressive development towards an ideal end and substitutes it with a circular

¹⁷¹ *ibid* 426; Walter Rech, 'International Law, Empire, and the Relative Indeterminacy of Narrative' in Martti Koskenniemi, Walter Rech and Manuel J Fonseca (eds), *International Law and Empire: Historical Explorations* (OUP 2017) 58. See also Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (CUP 2002) 516 ('History has put the international lawyer in a tradition that has thought of itself as the "organ of the legal conscience of the civilized world"').

¹⁷² Thomas Skouteris, *The Notion of Progress in International Law Discourse* (TMC Asser Press 2010) 5.

¹⁷³ *ibid* 21. See also Olena Sihvo, 'Global Constitutionalism and the Idea of Progress' (2018) 1 HLR 10, 20.

¹⁷⁴ For a more detailed overview, see generally David Koller, '... and New York and The Hague and Tokyo and Geneva and Nuremberg and... The Geographies of International Law' (2012) 23 EJIL 97. See also Deborah Z Cass, 'Navigating the Newstream: Recent Critical Scholarship in International Law' (1996) 65 Nord J Int'l L 341, 354 ('One of the central theses of the "newstream" in international law is that the "mainstream" insists on constructing the history of the discipline as a "narrative of inevitable progress"').

¹⁷⁵ See eg Nigel Purvis, 'Critical Legal Studies in Public International Law' (1991) 32 Harv Int'l LJ 81.

vision of international law constantly oscillating between opposing values.¹⁷⁶ On this view, international law is always indeterminate, which allows for the producing of an infinite number of arguments, which in turn make up the source of the continuous ‘renewal of the field’.¹⁷⁷ Critical legal studies do not advance any grand theory of international law akin to positivism or naturalism. Instead, they invite legal scholars and practitioners to question their most entrenched convictions by acknowledging the political nature of international law and accepting its radial indeterminacy as an asset, as ‘an absolutely central aspect of international law’s acceptability’.¹⁷⁸ But if the purpose of the counter-narrative is not to provide for a workable theory of international law but rather to critically evaluate how the dominant narrative generates its structures and how these structures distort the reality, then it is not suitable for, and in fact not even capable of, proposing workable solutions.¹⁷⁹ As Koskenniemi himself acknowledged:

By reducing international law to self-contained formalistic argument around opposing concepts, the critical counter-narrative has not merely placed the content of solutions to legal problems outside international law but has actually made this content inaccessible to the international lawyer, who lacks the means and methods to reach out of law’s endless circularity to sociology, philosophy, or political science to identify workable solutions and to introduce them to the legal discourse.¹⁸⁰

It follows that international law as a normative tool of regulating social interactions is inconceivable beyond the narrative of progress, at least at this stage of legal scholarship. However, this does not have to be viewed in purely pessimistic tones. Progress is not an inherently *bad thing*. On the contrary, it is needed to raise a sense of responsibility for making one’s own history and to make continuous efforts to ameliorate conditions of human existence. As Collingwood noted:

[M]ore dangerous [...] is the defeatist spirit which fears that what we are aiming at is no more than a Utopian dream. And this fear becomes paralyzing when [...] it calls in the help of philosophical ideas, and argues that the evils

¹⁷⁶ David Kennedy, ‘International Law and the Nineteenth Century: History of an Illusion’ (1996) 65 Nord J Int’l L 385, 399 (Claiming that international lawyers have purportedly built a progressive vision of international law to design their self-image); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (CUP 2002) (Here, Koskenniemi brilliantly contested the prevailing narrative that international law evolved in a linear way); Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005).

¹⁷⁷ See David Kennedy, ‘When Renewal Repeats: Thinking Against the Box’ (2000) 32 NYUJ Int’l Law & Pol 335, 345.

¹⁷⁸ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 591.

¹⁷⁹ Olena Sihvo, ‘Global Constitutionalism and the Idea of Progress’ (2018) 1 HLR 10, 20-21.

¹⁸⁰ Martti Koskenniemi, ‘Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons’ (1997) 10 LJIL 137, 153-54.

admittedly belonging to our moral, social, and political life are essential elements in all human life, or in all civilizations, so that the special problems of the modern world are inherently insoluble.¹⁸¹

Consequently, progress narratives can act as a call for action: '[B]y demystifying progress narratives, new possibilities are opened for the intellectual imagination on which to act in the world'.¹⁸² Global constitutionalism is one such possibility. Not only does it not attempt to bury the progress tropes behind the seemingly objective legal semantics, but it also puts the idea of progress at the very centre of its epistemology. To reiterate, progress only becomes 'unsettling' when it is couched in the seemingly objective language of international law. Such pretension for objectiveness and making progress 'speak itself'¹⁸³ are the principal weaknesses of the traditional theory attacked by the new stream. Considering the fact that the underlying rationale behind the counter-narrative is to make explicit the political nature of international legal argument, global constitutionalism as an embodiment of substantive (value-laden) liberalism in a sense takes this criticism seriously and thus distances itself from the dominant narrative. Ultimately, global constitutionalism does not assert that constitutionalisation of international law is the only way to go. It merely makes a positive claim (instead of a normative one) that this is what is now happening without any attempt to project a desirable future.¹⁸⁴

The final question to consider here is, as was poignantly formulated by Skouteris, whether 'progress [can] ever be universal or will it necessarily always involve power relations and an ideological struggle during which some will gain and others will lose'?¹⁸⁵ As was previously mentioned, statements on progress are never neutral. They are always value-laden. But to aspire for a theory of international law that would completely do away with politics is to be utterly idealistic. The propensity to exclude and marginalise is as old as history of a man and international law is not an exception. Thus, the challenge is not to get rid of the idea of progress as such but of the hegemonic agenda behind it. As Galindo has rightly observed, it is not the progress itself that is a problem but an *inevitable* progress: the false perception that a certain

¹⁸¹ Robin G Collingwood, 'The Present Need of a Philosophy' in Robin G Collingwood and David Boucher (eds), *Essays in Political Philosophy* (1934) 168-69 cited in James Connolly, 'A Time for Progress?' (2004) 43 *Hist & Theor* 410, 419.

¹⁸² George RB Galindo, 'Progressing in International Law' (2010) 11 *Melbourne J Int'l L* 1, 4 referring to Thomas Skouteris, *The Notion of Progress in International Law Discourse* (TMC Asser Press 2010) 227ff.

¹⁸³ As Skouteris explained, by making progress 'speak itself', international lawyers create an image of objectiveness, rationality and inevitability of their progress narratives. Otherwise, it would not be 'true' progress but ideology. Thomas Skouteris, *The Notion of Progress in International Law Discourse* (TMC Asser Press 2010) 17; Thomas Skouteris, 'The Idea of Progress' in Anne Orford, Florian Hoffmann and Martin Clark (eds), *The Oxford Handbook of the Theory of International Law* (OUP 2016) 948.

¹⁸⁴ Olena Sihvo, 'Global Constitutionalism and the Idea of Progress' (2018) 1 *HLR* 10, 21-22.

¹⁸⁵ Thomas Skouteris, *The Notion of Progress in International Law Discourse* (TMC Asser Press 2010) 21.

prevailing idea will remain immune from critique.¹⁸⁶ Only when the language of progress is transparent and inclusive can it act as an engine for the universal development.

It follows that global constitutionalism is a discourse of progress, but it is founded on assumptions that minimise exclusion. First, constitutionalisation of international law entails ‘softening’ of international law. As Shelton contented:

Non-binding commitments may be entered into precisely to reflect the will of the international community to resolve a pressing global problem over the objections of the one or few states causing the problem, while avoiding the doctrinal barrier of their lack of consent to be bound by the norm.¹⁸⁷

Non-binding commitments permit, in principle, the inclusion of all interested parties in a process of international lawmaking.¹⁸⁸ Because the traditional channels of norm-creation, such as treaties (especially law-making treaties) and custom, are more often than not orchestrated by leading states and yet establish obligations towards all the world rather than with respect to particular parties, recourse to soft instruments is equally available to developing states and can, thus, be viewed as a tool of empowerment rather than exclusion.¹⁸⁹

Second, constitutionalisation of international law presupposes the revision of the doctrine of custom. From this perspective, it is not the practice of individual states that counts most but rather the existence of universal *opinio juris* that a certain norm is desirable and/or needed. Thus, constitutionalising international law for the purposes of ascertainment of a customary norm discounts the requirement of general and consistent state practice and instead focuses primarily on statements.¹⁹⁰ Unlike traditional doctrine of custom, where the formation of custom is effectuated by a handful of the most powerful and wealthy states, the process of the so-called ‘modern custom’ formation is a conscious, egalitarian and deliberate process. Because it gives an equal voice to all participating parties, it makes international law, in words of Charney, truly ‘universal’.¹⁹¹

Another domain where constitutionalisation has transformed international law into more inclusive is the doctrine of sources itself. Global constitutionalism presupposes a shift of emphasis from individual state consent to universal consensus as the basis of an international legal obligation. In more concrete terms, it would mean that treaties as the main source of obligations in

¹⁸⁶ George RB Galindo, ‘Progressing in International Law’ (2010) 11 Melbourne J Int’l L 1, 3.

¹⁸⁷ Dinah Shelton, ‘International Law and “Relative Normativity”’ in Malcolm D Evans (ed), *International Law* (OUP 2010) 144.

¹⁸⁸ Wolfgang H Reinicke and Jan M Witte, ‘Interdependence, Globalization, and Sovereignty: The Role of Non-binding International Legal Accords’ in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (OUP 2000) 94.

¹⁸⁹ This point is elaborated in section 4.3.2.

¹⁹⁰ Anthea E Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (2002) 95 AJIL 756, 757-91.

¹⁹¹ Jonathan Charney, ‘Universal International Law’ (1993) 87 AJIL 529, 529. For a more comprehensive analysis, see section 4.2.2.

Westphalian society give way to the sources more easily accommodating the common interest of the international community,¹⁹² such as custom in its above-mentioned conceptualisation and general principles. As regards the latter, it is now widely accepted that although article 38(1) of the Statute of the International Court of Justice does not establish a hierarchy of sources, in actual fact general principles of law are almost never referred to, at least in explicit terms, in the international fora due to their non-consensual character. Constitutionalisation of international law envisages a more frequent recourse to this third source as an ultimate repository of universal values. Because general principles of international law derive from a large number and variety of domestic legal systems, obligations they impose are more universal than those established by (multilateral) treaty or custom.¹⁹³

In conclusion, narratives of progress are vital for international law's identity and self-perception as well as its capability to shape future paths. Making these narratives explicit curtails abuse and serves as a platform for revising the 'filter of right solutions'.¹⁹⁴ Global constitutionalism is one of the most sophisticated modern approaches in international law. Not only is it explicit about its vision of international law as a sign and instrument of progress, but it also attempts to make this a virtue by universalising this process and minimising exclusion. On this view, international law is, at an increasing rate, a product of international consensus rather than consent of a dozen of the most powerful nations. It is clear that following the global decline of the rule of law and ongoing human rights violations around the globe caused by transnational terrorism threats, internal conflicts, state aggression and the rise of a new type of authoritarianism – 'authoritarian in political form, capitalist in economics, and nationalist in ideology'¹⁹⁵ – global constitutionalism is now in (temporal) retreat.¹⁹⁶ Moreover, in many places and contexts political authority continues to be, at least to certain extent, justified with reference to more traditional legitimating factors, such as state sovereignty, national identity, local traditions or divine considerations. For instance, China's recent appropriation of certain rocks and islands in the East and South China Sea with a view to extend its air defence zone in contravention to its obligations under the Law of the Sea Convention and refusing any legal proceedings is better understood through the frames of reference of realism rather than

¹⁹² For a more detailed discussion, see Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999) 281 RCADI 21, 306. See generally Christian Tomuschat, 'Obligations Arising for States Without or Against Their Will' (1993) 241 RCADI 199.

¹⁹³ Olena Sihvo, 'Global Constitutionalism and the Idea of Progress' (2018) 1 HLR 10, 24.

¹⁹⁴ Thomas Skouteris, *The Notion of Progress in International Law Discourse* (TMC Asser Press 2010) 229.

¹⁹⁵ Michael Ignatieff, 'The New World Disorder' (2014) LXI New York Review of Books 30 (25 September) 3
<http://www.michaelignatieff.ca/assets/pdfs/The%20New%20World%20Disorder_NYRB.pdf> accessed 24 August 2016.

¹⁹⁶ Olena Sihvo, 'Global Constitutionalism and the Idea of Progress' (2018) 1 HLR 10, 26.

constitutionalism.¹⁹⁷ Similar concern relates to the USA's exorbitant exercise of extraterritorial jurisdiction in criminal and civil matters, on the one hand, and its simultaneous denial of jurisdiction over its activities with respect to 'enemy combatants' as well as its efforts to prevent the exercise of universal jurisdiction by other states, on the other.¹⁹⁸ Likewise, Russian involvement in the breakaway of Crimea from Ukraine in 2014 as well as its ongoing military presence in eastern Ukraine in blatant violation of the UN Charter is but another serious challenge to global constitutionalism. Additionally, the repeated *ad nauseam* invocation of cultural relativism in the debate on universality of human rights, including the right to democracy, assumes the particularistic and Western character of global constitutionalism.¹⁹⁹

However, one should not be confused by these separate trends. Constitutionalisation of international law is not necessarily a linear process and temporal setbacks as well as exceptionalist policies of individual states do not distort the general pattern of value-based transformation of international law. Notably, even those states that frequently act contrary to the constitutional ideals, nonetheless, seek international validation by 'investing in constitutionalist gestures, thereby implicitly acknowledging the legitimating normative power of constitutionalism'.²⁰⁰ On the grass-root level, the same constitutionalist rhetoric of human rights, democracy and the rule of law is invoked by the oppressed, exploited and discriminated against seeking to articulate their grievances and improve their lives. Thus, constitutionalism is not confined to the West, it is global. It provides 'a vocabulary that has a hold on the world — it is able to connect to the inside of institutions, procedures, practices and self-understandings that are central to the legal and political world we live in'.²⁰¹ Moreover, legal and political practices of every polity are already, by and large, shaped by constitutional norms and are thus susceptible to be scrutinised and assessed from an external (international) standpoint. It follows that global constitutionalism as an approach and idea in international law is based on a shared endorsement of core constitutional principles of the rule of law, separation of powers and human rights within the wider context of global society and is nothing but universal.

¹⁹⁷ See Mattias Kumm and others, 'How Large is the World of Global Constitutionalism?' (2014) 3 *Global Constitutionalism* 1, 5.

¹⁹⁸ See generally Anne Peters, 'The Growth of International Law between Globalisation and the Great Power' (2003) 8 *ARIEL* 109.

¹⁹⁹ See eg Federico Lenzerini, *The Culturalization of Human Rights Law* (OUP 2014) ch 1.

²⁰⁰ Mattias Kumm and others, 'How Large is the World of Global Constitutionalism?' (2014) 3 *Global Constitutionalism* 1, 5.

²⁰¹ *ibid* 6.

2.4. Global Constitutionalism as a ‘Law-in-Context’ Approach

The present research falls into the category of socio-legal research. Albeit largely employing traditional ‘rules of the game’, it is not doctrinal research as the knowledge it produces is not intended for judges and other legal practitioners, nor is it a research in constitutional law. The central purpose of this project is to make sense of international law as well as to resolve particular legal issues from an external standpoint, rather than from a viewpoint of an internal participant. The importance of such undertaking lies in the novelty and distinctiveness of the final outcome as compared to the research result to be produced within the confines of the doctrinal tradition. As Douglas Vick succinctly observed, interdisciplinarity presupposes that researchers, in addition to ‘black-letter’ approach, resort to an amalgam of theories, methods and techniques borrowed from other social disciplines that are integrated and synthesised to produce a type of analysis that would not otherwise be possible should either discipline be utilised in isolation.²⁰² The value of external perspective is hard to overestimate since international law is much more than a mere accumulation of legal rules waiting to be discovered and interpreted. Other perspectives are necessary to explain the whole phenomenon of international law. In addition, on the account of the utilised methodology and the level and extent of the interdisciplinary interplay, it is germane to designate this work as a socio-legal *lite* research (theoretical socio-legal research or ‘law-in-context’ research).²⁰³ Because it is not socio-legal methods proper (quantitative or qualitative) that are used but a particular theory transplanted from the domain of political science to the domain of law to account for certain phenomena, not otherwise addressed by law, one cannot claim doing socio-legal research *par excellence* but rather a light version of it, that is socio-legal *lite* research, in the sense that this research is context-aware but does not include hardcore socio-legal methods.

2.5. Conclusion

This chapter has sketched out the theoretical basis of the present thesis. It is argued that such theoretical self-reflection does not amount to a ‘shopping-mall approach’ to method, whereby one selects an approach which most adequately corresponds to one’s personal idiosyncrasies and academic objectives. Rather, such methodological openness is premised on an idea that

²⁰² Douglas Vick, ‘Interdisciplinarity and the Discipline of Law’ (2004) 31 JLS 163, 163-65. For a more general overview, see Joe Moran, *Interdisciplinarity (The New Critical Idiom)* (2nd edn, Routledge 2010).

²⁰³ A good overview of the socio-legal *lite* approach is presented by William Twining, *Law in Context: Enlarging a Discipline* (OUP 1997).

any type of legal research inevitably involves theoretical assumptions having bearing on the way how the research is conducted, what type of data is regarded as legitimate and who is the ultimate beneficiary of the research outcomes. Thus, the crucial task of any researcher is not to conceal her methodological predisposition as unnecessary, impractical and unscientific but, on the contrary, to demonstrate in explicit terms her theoretical awareness and self-consciousness as preconditions of informed criticism and scientific soundness.

This thesis is, thus, placed within confines of neoliberal reading of international law, which most adequately reflects the ongoing value-orientation and humanisation of the international system. It is acknowledged that any value-based conception of international law involves subjective judgments on what those values are and how they are to be promoted and enforced, which is reminiscent of the nineteenth-century standard of civilisation. It is demonstrated, however, that the propensity to impose a particular substantive world vision is an inherent feature of human society, which cannot be eliminated but can be effectively controlled. Global constitutionalism is suggested to be a solution to the increasingly complex international political environment where the need to promote equality, non-intervention and inclusiveness is as essential as to maintain a certain core of values as a *sine qua non* of unity, integrity and efficiency of the post-Westphalian order. It is founded on three fundamental pillars: democracy, human rights and the rule of law — values recognised by the international community in variety of instruments. This necessarily implies that international law cares about domestic political systems, that is how national governments are formed. The legitimacy of the constitutional rationale is based on the fact that, unlike other value-based conceptions of international law, it is primarily descriptive and does not seek to force into existence normative ideas unsupported by state consent, even though the latter's conceptualisation is somewhat modified because it is increasingly derived from, and is shaped by, international consensus.

It is subsequently recognised that even though global constitutionalism is primarily concerned with capturing, mapping and explicating ongoing behavioural patterns of states and other subjects of international law without advancing a desired course of action, it is based on progressive reading of history because its legitimacy base relies on the assumption that constitutionalising international law is more effective in responding to modern challenges than the Westphalian system of decentralised and consent-based interaction and is, thus, superior to the pre-constitutionalised order. However, the idea of progress is tainted by the risk of imperialism since it is allegedly a narrative constructed by hegemonic powers who possess military capacity and economic resources to impose their understanding of 'global' values upon the weak and thereby to shift alternative narratives to the periphery.

In response to these criticisms, it is established that albeit global constitutionalism speaks the language of progress, it is based on assumptions that minimise abuse and exclusion. First, softening of international law as a layer of global constitutionalisation implies that more states than ever before

can now participate in the process of international law-making because it is easier and less costly. Second, the revision of the doctrine of custom implies that more credence is given to universal *opinio juris* that certain norm is desirable and/or needed, rather than to individual instances of state practice of the most powerful states who possess political authority and economic resources to make their actions count. Third, because constitutionalisation of international law implies a shift of emphasis from individual state consent to universal consensus as the basis of an international legal obligation, sources that more easily accommodate the common interest, such as general principles of law, assume prominence. Because such principles derive from a large number and variety of domestic legal systems, obligations they impose are more universal than those established by (multilateral) treaty or custom.

In conclusion, it is submitted that global constitutionalism is a ‘law-in-context’ approach by virtue of its pedigree (political science), methodology (theoretical rather than empirical), objectives (assumes a certain progressive stance vis-à-vis international order rather than simply preserves the state of affairs) and ultimate audience (broader academic community).

3. Defining Democracy

With the apparent demise of Soviet Communism and the Marxist version of socialism, many claim that liberal-democracy, and perhaps capitalism, won the Cold War. But the crucial question is, about which liberalism, which democracy and which capitalism is this claim made.¹

Irrespective of the widespread support for democracy in the years following the fall of communism, the definition of what is at stake is still a critical issue to be addressed. Quite surprisingly, the notion of democracy was employed to designate multifarious forms of government as well as political processes over wide periods of time.² As Burchill pointedly observed,

Democracy has been conceptualised as an entitlement all societies possess, as a human right individuals are able to exercise through accepted procedures, as a criterion for the recognition of legitimate governance, as a justification for intervention and the use of force, and as an overriding principle upon which the international system is ordered'.³

What renders situation even more complicated is the internationally recorded references to democracy as both an 'ideal' and a 'form of government'. For instance, the Inter-Parliamentary Union in its 1997 Universal Declaration on Democracy contemplates that '[d]emocracy is both an ideal to be pursued and a mode of government to be applied'.⁴ It states:

As an ideal, democracy aims essentially to preserve and promote the dignity and fundamental rights of the individual, to achieve social justice, foster the economic and social development of the community, strengthen the cohesion of society and enhance national tranquillity, as well as to create a climate that is favourable for international peace. As a form of government, democracy is the best way of achieving these objectives.⁵

A similar fuzziness in definition is observable in other international documents, such as, for instance, a UNGA Resolution, which provides that:

¹ Conrad Waligorski, *Liberal Economics and Democracy: Keynes, Galbraith, Thurow, and Reich* (UP of Kansas 1997) 1.

² The work of David Held, aimed to demonstrate a variety of practices and regimes falling under the notion 'democracy', is illustrative in this respect. David Held, *Models of Democracy* (3rd edn, Polity Press 2006).

³ Richard Burchill, 'The Developing International Law of Democracy' (Review Article) (2001) 64 MLR 123, 126.

⁴ Inter-Parliamentary Union, Universal Declaration on Democracy (Cairo, 16 December 1997) para 2 <<http://www.ipu.org/cnl-e/161-dem.htm>> accessed 24 August 2016.

⁵ *ibid* para 3.

[T]he essential elements of democracy include respect for human rights and fundamental freedoms, inter alia, freedom of association and peaceful assembly and of expression and opinion, and the right to take part in the conduct of public affairs, directly or through freely chosen representatives, to vote and to be elected at genuine periodic free elections by universal and equal suffrage and by secret ballot guaranteeing the free expression of the will of the people, as well as a pluralistic system of political parties and organizations, respect for the rule of law, the separation of powers, the independence of the judiciary, transparency and accountability in public administration, and free, independent and pluralistic media [...].⁶

Moreover, the consensus on the definition of democracy is precluded by disagreement on whether democracy is a question of kind or one of degree, that is whether democracy is a binary concept in the sense that state is either democratic or non-democratic or whether democracy is a question of degree in the sense that some states are more democratic than others.⁷ Ultimately, the key complexity lies in the ambiguity as to whether democracy should be referred to as a process of free and genuine elections or whether it is a substantive concept embracing the whole nitty-gritty of a liberal democratic society. The absence of agreement on the meaning of democracy has prevented consensus on the emergence of a human right to democratic governance. This thesis seeks to bring some clarity to the definition of democracy through the prism of the constitutionalist rationale. That said, the thesis will first trace the main contours of the debate on the definition of democracy, which primarily revolves around the discussions on theories and models of democracy. Hereafter, the international law's conception of democracy will be revisited and the novel definition will be developed.

3.1. Theories of Democracy

The term 'democracy' derived from Greek *demokratia* which is a synthesis of *demos* ('people') and *kratos* ('rule'). Literally, the term stands for 'rule by people' and was coined to describe the political system in some Greek city-states, notably Athens.⁸ In classical antiquity and up to the seventeenth century, democracy was largely associated with the gathering of citizens in assemblies and other public places to decide on political issues of a polity. It was only by the early nineteenth century that the concept acquired its modern meaning, that is democracy as a right of citizens to participate in political life of their country

⁶ UNGA Res 59/201 (20 December 2004) UN Doc A/Res/59/201, para 1. See also UNCHR Res 32 (2005) UN Doc E/CN.4/RES 2005/32, para 1 (Repeating *verbatim* the 2004 resolution).

⁷ Giovanni Sartori, *The Theory of Democracy Revisited* (CQ Press 1987) 184. See also Niels Petersen, 'The Principle of Democratic Teleology in International Law' (2009) 34 *Brook J Int'l L* 33, 37.

⁸ Robert A Dahl, 'Democracy', *Encyclopedia Britannica* (2010) <<https://global.britannica.com/topic/democracy>> accessed 24 August 2016.

through the medium of elected representatives.⁹ Within the broad discourse on the definition of democracy in political science, it is thus possible to distinguish three principal theories of democracy: classical theory of democracy (or government-centric theory of democracy), procedural theory of democracy (or competitive theory of democracy) and substantive theory of democracy. The former was adopted at the end of the eighteenth century and conceptualised democracy in terms of sources of authority for government (will of the people), purposes served by government (personal development and material goods) and procedures for forming government (political participation, such as e.g. participation in elections).¹⁰ The latter element was subject to restrictive criteria, such as wealth, sex, societal status, birth and education.¹¹ Moreover, liberal political and economic rights formed the cornerstone of thought on democracy within the classical liberal democratic theory. The most prominent representatives of this strand of thought are John Locke, Montesquieu, Adam Smith, Jeremy Bentham and James Mill.¹²

This classical theory of democracy with its premium on government and individual rights was challenged by Joseph Schumpeter. For him, the theory did not provide for clear guidelines as to how to distinguish democratic regimes from non-democratic ones, and democracy from this theoretical perspective bounds, so the story goes, to be rather an ideal than a method.¹³ He wanted to approach democracy not as an ideal ‘utopian’ normative system but as a form of governance with narrow but clear procedural determinants. To assert that democracy entailed ‘the rule of people’ for ‘common good’ was, for Schumpeter, foolish, because people in democracies did not rule, they merely elected their rulers, and because the objective ascertainment of common good was practically impossible. To this end he proposed what he termed ‘another theory of democracy’, which is now commonly viewed as competitive theory. The ‘democratic method’, he suggested, ‘is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote’.¹⁴ The same position is maintained by another prominent scholar, Samuel Huntington, who argues that

Elections, open, free and fair, are the essence of democracy, the inescapable *sine qua non* [...] Governments produced by elections may be inefficient, corrupt, shortsighted, irresponsible, dominated by special interests, and incapable of adopting policies demanded by the public good. These qualities

⁹ Norberto Bobbio, *Democracy and Dictatorship* (Peter Kennealy tr, Polity Press 1989) 144.

¹⁰ Samuel P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991) 6. See also Joseph A Schumpeter, *Capitalism, Socialism, and Democracy* (Harper 1947) 269.

¹¹ See David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity Press 1995) 9-12.

¹² For a more comprehensive account, see Milja Kurki, *Democratic Futures: Revisioning Democracy Promotion* (Routledge 2013) 32-39.

¹³ Joseph A Schumpeter, *Capitalism, Socialism, and Democracy* (Harper 1947) 266, 269.

¹⁴ *ibid* 269.

may make such governments undesirable but they do not make them undemocratic.¹⁵

On this account, democracy has no inherent normative content and is largely about electoral process: people's participation in political process is reduced to casting a vote once in a circumscribed timespan and resuming the role of passive observers between elections. It can be gauged on the basis of such (empirically verifiable) criteria as universal participation, that is everyone is entitled to participate in elections, both as a voter and as a candidate; majority rule, meaning that decisions are taken by majority; and formal equality (one man, one vote), implying that every vote counts equally. While this theoretical model does not literally refuse to look beyond the institution of elections and recognises the importance of other rights, it endorses these rights inasmuch as they support the right to political participation rather than on their own merit.¹⁶ Importantly, the role of democracy is not even to represent the will of the people, as the theorists of the classical theory of democracy had opined. In Macpherson's terms, for Schumpeter, '[t]he voters' role is not to decide political issues and then choose representatives who will carry out those decisions: it is rather to choose the men who will do the deciding'.¹⁷ Notably, this *thin* procedural understanding of democracy has been supplemented by a *thick* procedural model, also labelled as an 'expanded procedural minimum' model,¹⁸ mostly associated with Dahl and his concept of polyarchy,¹⁹ which insists on constitutional guarantees and checks on the exercise of executive power as well as the government's capability to rule effectively.²⁰

Thus, till the 1970s the debate was enduring between the adherents of the classical 'value-based' approach, equating democracy with source or purpose, and those subscribing to procedural understanding *à la* Schumpeter. That latter school eventually won the battle given the analytical precision and empirical

¹⁵ Samuel P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991) 9-10. See also Adam Przeworski and others, 'What Makes Democracies Endure?' (1997) 7 *Journal of Democracy* 39, 50-51.

¹⁶ Jure Vidmar, *Democratic Statehood in International Law* (Hart Publishing 2013) 17.

¹⁷ Crawford Brough Macpherson, *The Life and Times of Liberal Democracy* (OUP 1977) 78.

¹⁸ David Collier and Steven Levitsky, 'Democracy with Adjectives: Conceptual Innovation in Comparative Research' (1997) 49 *Wld Pol* 430, 434.

¹⁹ Dahl coined this term in 1953 to refer to a modern representative democracy with universal suffrage. Because a fully-fledged democracy is not practically possible in the modern world, where everyone would have a genuinely equal possibility to partake in political decisionmaking and where government would be fully responsive to the concerns of the whole citizenry, Dahl employed the term 'polyarchy' to designate the more limited form of democracy that is realistically feasible. Robert A Dahl, *Polyarchy: Participation and Opposition* (Yale UP 1971) 90, 97.

²⁰ See eg David Collier and Steven Levitsky, 'Democracy with Adjectives: Conceptual Innovation in Comparative Research' (1997) 49 *Wld Pol* 430, 434. Similar distinction was also developed by Riker who established a gradation between two procedural versions of democracy: populism (thin) and liberalism (thick). William H Riker, *Liberalism against Populism* (Freeman 1982). The distinction drawn by Meny and Surel between popular democracy and constitutional democracy is also illustrative of this trend. Yves Meny and Yves Surel, *Democracies and the Populist Challenge* (Palgrave Macmillan 2002) 7-11.

verifiability of the procedural model.²¹ Yet, Schumpeterian conception quickly attracted multifarious criticisms.²² Terry Karl called the model in question a ‘fallacy of electoralism’ by pinpointing to the fallacious privileging of the electoral side of democracy over other vital dimensions, failure to account for the dangers of majoritarianism and the lack of the real control of citizenry over political decisions affecting their lives.²³ Other scholars characterised minimalist democracy as an ‘apology for exclusionary government power’²⁴ and as an ‘euphemism for sophisticated modern forms of neo-authoritarianism’,²⁵ which are denominated by political scientists in a variety of ways, including such qualifiers as semi-democracy, formal democracy, electoral democracy, facade democracy, pseudo-democracy, hybrid democracy, illiberal democracy, virtual democracy, delegative democracy, competitive-authoritarian regime, soft authoritarianism and electoral authoritarian regime.²⁶ As Susan Marks succinctly observed, ‘[i]mportant though the institutions and procedures of representative democracy clearly are, they cannot be allowed to exhaust the meaning of democracy. To permit this is to give up on the idea that democracy is about self-government, and not just

²¹ Samuel P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991) 6-7.

²² See, inter alia, Terry Karl, ‘Imposing Consent? Electoralism versus Democratization in El Salvador’ in Paul Drake and Eduardo Silva (eds), *Elections and Democratization in Latin America, 1980-1985* (Center for US/Mexican Studies 1986) 9-36; Susan Marks, ‘The “Emerging Norm”: Conceptualizing “Democratic Governance”’ (1997) 91 ASIL Proc 372, 373; Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (OUP 2000) 59-60; Brad R Roth, ‘Evaluating Democratic Progress’ in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 495; Richard Burchill, ‘The Developing International Law of Democracy’ (Review Article) (2001) 64 MLR 123, 125-26; Giovanni Sartori, ‘How Far Can Free Government Travel?’ in Larry Diamond and Marc F Plattner (eds), *Democracy: A Reader* (The Johns Hopkins UP 2009) 50.

²³ Terry Karl, ‘Imposing Consent? Electoralism versus Democratization in El Salvador’ in Paul Drake and Eduardo Silva (eds), *Elections and Democratization in Latin America, 1980-1985* (Center for US/Mexican Studies 1986) 9-36

²⁴ Richard Burchill, ‘The Promotion and Protection of Democracy by Regional Organizations in Europe: The Case of Austria’ (2001) 7 EPL 79, 81.

²⁵ Barry Gills, Joel Rocamora and Richard Wilson, ‘Low Intensity Democracy’ in Barry Gills, Joel Rocamora and Richard Wilson (eds), *Low Intensity Democracy: Political Power in the New World Order* (Pluto Press 1993) 21.

²⁶ For a detailed discussion on a variety of regimes that hold periodic elections but fall short of providing meaningful political participation and protection of human rights, see eg Fareed Zakaria, ‘The Rise of Illiberal Democracy’ (1997) 76 Foreign Aff 22; David Collier and Steven Levitsky, ‘Democracy with Adjectives: Conceptual Innovation in Comparative Research’ (1997) 49 Wld Pol 430, 430-31; Larry Diamond, ‘Thinking about Hybrid Regimes’ (2002) 13 Journal of Democracy 21, 23; Thomas Carothers, ‘The End of the Transition Paradigm’ (2002) 13 Journal of Democracy 5, 9-10; Steven Levitsky and Lucian A Way, ‘The Rise of Competitive Authoritarianism’ (2002) 13 Journal of Democracy 51; Andreas Schedler, ‘The Menu of Manipulation’ in Larry Diamond and Marc F Plattner (eds), *Democracy: A Reader* (The Johns Hopkins UP 2009) 270 (Table 2).

about legitimating government by others'.²⁷ Mere elections in slave-society would not amount to democracy.

Substantive theory of democracy was invented to tackle the weaknesses of the procedural view and has been buttressed by an increased awareness of the problems that many states face despite the increase in 'electoral democracy'. It is founded on democracy's underlying principles, such as (substantive) equality and self-empowerment: democracy entails fostering of a fully developed individual capable of exercising meaningful free choice and to fully participate in public affairs. The most sophisticated account of this model was given by Beetham. According to him,

The core idea of democracy is that of popular vote or popular control over collective decision-making. Its starting point is with the citizen rather than with the institutions of government. Its defining principles are that all citizens entitled to a say in public affairs, both through the associations of civil society and through participation in government, and that this entitlement should be available on terms of equality to all. Control *by* citizens over their collective affairs and equality *between* citizens in the exercise of that control are the basic democratic principles.²⁸

Similar view is aired by Held, who claimed that genuine democracy is based on participation of 'free and equal' individuals 'in the processes of deliberation about the conditions of their own lives and in the determination of those conditions, so long as they do not deploy this framework to negate the rights of others'.²⁹ Democracy is, thus, not an absolute and static notion but a continuous process of enhancing political equality and self-rule.³⁰ It is to be understood in terms of a social contract aimed to protect citizen's rights. In this view, elections are not an end in itself but a means of creating a society of equal citizens enjoying equal access to political institutions and processes and exercising meaningful influence on the decision-making of their leaders. Rather than being confined to procedural pillars of universal participation, electoral equality and majoritarianism, the substantive view evaluates democracy on the basis of substance of government policies. Most theorists claim that democratic government must guarantee civil and political rights and freedoms. Some go further by adding social and economic rights to the list of requirements that governments should be evaluated against.

The substantive model of democracy has not escaped criticisms either. It is often claimed to be a philosophical ideal lacking precise conceptual frames to be workable. Huntington's position well reflects these concerns:

²⁷ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (OUP 2000) 2.

²⁸ David Beetham, *Democracy and Human Rights* (Polity Press 1999) 90-91 (emphasis original).

²⁹ David Held, *Models of Democracy* (3rd edn, Polity Press 2006) 264.

³⁰ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (OUP 2000) 73.

To some people democracy has or should have much more sweeping and idealistic connotations. To them, 'true democracy' means *liberté, égalité, fraternité*, effective citizenship control over policy, responsible government, honesty and openness in politics, informed and rational deliberation, equal participation and power, and various other civic virtues. These are, for the most part, good things and people can, if they wish, define democracy in these terms. Doing so, however, raises the problems that come up with the definitions of democracy by source or by purpose. Fuzzy norms do not yield useful analysis.³¹

Moreover, given the generic character of the substantive conception, it is viewed by some as a modern neocolonial strategy.³² Since such highly abstract concepts as the rule of law, accountability and respect for human rights are difficult to measure, states' policies of substantive democracy promotion may serve as a guise for neocolonial interventionism. There are also scholars taking a middle-ground position on the issue in question. While claiming that respect for economic, social and cultural rights does not necessarily constitute an unalienable element of democratic regime, they do not deny completely the impact of this strand of rights on functioning of democracy.³³

Thus, it should be clear by this point that democratic political theory lacks a unitary understanding of democracy. The procedural model is attractive due to its practical measurability and comparability. However, with its unhealthy focus on elections it provides a distorted picture of political reality since it fails to distinguish between liberal democracies and a variety of electoral regimes paying scant or no regard to the protection of human rights. For the adherents of the substantive theory, democracy is more than a political system or an electoral method and comprises a set of practices and values founded on the respect for human dignity. Yet, the absence of precise theoretical ramifications of the concept makes it ineffective, useless and vulnerable to abuse. To address both types of criticisms, some quarters of scholarly community sought to underscore the ongoing nature of the concept of democracy. For them, '[s]ubstantive democracy is a maximum goal, relevant to normative evaluation of all regimes but susceptible only of incomplete realization in even the most highly developed polity. Popular sovereignty is a minimum goal, requisite to the bare recognition of a government's legitimacy against the claims of rival contestants'.³⁴ However, such understanding does not solve the conceptual indeterminacy of the notion of democracy, it merely restates the incapability of the concept to reconcile the substantive virtue of genuine citizen empowerment with the procedural virtues of quantifiability and precision.

³¹ Samuel P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991) 9.

³² Mart Koskeniemi, 'Whose Intolerance, Which Democracy' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 439-40.

³³ Jean d'Aspremont, *L'État non démocratique en droit international* (Pedone 2008) 33.

³⁴ Brad Roth, 'Evaluating Democratic Progress' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 512. See also James Allan, 'Liberalism, Democracy and Hong Kong' (1998) 28 HKLJ 156, 164-65.

Before attempting to ‘update’ the democratic theory, it is worth pausing to consider the existing classification of democracy into several types, or models.

3.2. Models of Democracy

Apart from the debate on the ‘right’ theory of democracy, the imprecise and contested nature of the concept of democracy is neatly captured in the idea of ‘models of democracy’. In fact, there are two competing models, or conceptions, of democracy in political science — revolutionary (one-party) democracy and liberal (representative) democracy. Noteworthy, Held also added the concept of ‘direct democracy’ to this classification.³⁵ However, this model is only useful in historical perspective as it was incepted in ancient Greek city-states and is not feasible in the modern nation-state. Consequently, the present thesis focuses on the two remaining conceptions. Before examining each model of democracy, it is imperative to briefly note that ‘model of democracy’ is a notion which refers ‘to a theoretical construction designed to reveal and explain the chief elements of a democratic form and its underlying structure of relations [...] Models are [...] complex “networks” of concepts and generalisations about aspects of the political realm and its key conditions of entrenchment, including economic and social conditions’.³⁶ This implies that there is no single concept of democracy but various ways of understanding the meaning of democracy, which can acquire multiple specificities — ‘assemblages of ideas, forms and values’.³⁷ In this sense, democracy is understood as a social construction, which does not simply ‘exist out there’ but whose meaning and content are shaped through specific assumptions and ideas held about the concept and its relationship to other concepts.

That said, one-party democracy, or what Talmon proposed to call ‘totalitarian democracy’, is built on the principle of ‘government *for* the people’ and is commonly associated with fascist and communist regimes.³⁸ It is characterised by the existence of broad public sphere and absence of genuine choice in political processes. Authority is legitimatised by the claim that the ruling elite is in a better position to decide what is in the best interests of the people. Liberal democracy, on the other hand, advocates the maintenance of a broad sphere of private liberty and is based on the principle of ‘government *by* the people’ as people are entrusted with the possibilities and means to decide themselves how to organise their polity.³⁹ Its liberal character is marked by the presence of the network of internal and external checks on political power and

³⁵ David Held, *Prospects for Democracy. North, South, East, West* (Polity Press 1993) 15.

³⁶ David Held, *Models of Democracy* (3rd edn, Polity Press 2006) 6.

³⁷ Milja Kurki, *Democratic Futures: Revisioning Democracy Promotion* (Routledge 2013) 26.

³⁸ Talmon made a distinction between ‘totalitarianism of the Left’ and ‘totalitarianism of the Right’. See Jacob L Talmon, *The Origins of Totalitarian Democracy* (Secker & Warburg 1952) 6-7.

³⁹ See Andrew Heywood, *Politics* (Macmillan Press 1997) 68-69.

its democratic dimension is maintained by the system of free, fair and regular elections.⁴⁰

The tension between these two models of democracy lies in the claim that ‘both, if carried to extremes, could undermine the practice of democracy: the measures aimed at developing the private sector by destroying the basis for satisfying collective needs and exercising legitimate authority; the measures aimed at developing the public sector by destroying the basis for satisfying individual preferences and controlling illegitimate government actions’.⁴¹ That said, for some commentators, both one-party democracy and liberal democracy are equally democratic but in different ways.⁴² For others, calling one-party regimes democratic is to distort the very idea of democracy as popular sovereignty, since it is only in liberal democracy that collective empowerment and human rights can co-exist.⁴³

Although this conundrum persists to the present day, it is fair to say that liberal democracy, apart from dominating democratic theory, economic theory and social life more widely, is now globally accepted as the only form of government compatible with international human rights standards. Its defining features are constitutional government, bill of rights, division of powers, system of checks and balances, regular and competitive elections conducted on the basis of universal suffrage and political equality, political pluralism, autonomous civil society and market economy.⁴⁴

It is clear from the above that the notion of liberal democracy lies at the intersection of three broad conceptions: liberalism (individual rights and freedoms), constitutionalism (rule of law, division of powers and system of checks and balances) and democracy (elections and popular sovereignty). Any other model of democracy falling foul of any of these elements, including one-party democracy, is a contradiction in terms. It remains, however, unclear how the term ‘liberal democracy’ came to embrace such a wide range of theoretical perspectives. For instance, one can argue that the relationship between liberalism and democracy is rather artificial and contingent than natural and inevitable. Liberalism is essentially about protecting individual liberties, while democracy functions on the basis of majority rule. Majority’s decisions can be unwelcome for minorities, even repressive, and, thus, illiberal. But can one possibly call those undemocratic? The answer partly depends on what theory of democracy one embraces: procedural or substantive. Hayek, for instance,

⁴⁰ Andrew Heywood, *Politics* (Macmillan Press 1997) 28; See also Andrew Heywood, *Political Ideologies: An Introduction* (Palgrave Macmillan 2012) 40.

⁴¹ Philippe C Schmitter and Terry L Karl, ‘What Democracy Is and Is Not’ in Larry Diamond and Marc F Plattner (eds), *Democracy: A Reader* (The Johns Hopkins UP 2009) 5.

⁴² *ibid.*

⁴³ See eg Jack Donnelly, ‘Human Rights, Democracy and Development’ (1999) 21 Hum Rts Q 608, 621.

⁴⁴ Andrew Heywood, *Politics* (Macmillan Press 1997) 28; Andrew Heywood, *Political Ideologies: An Introduction* (Palgrave Macmillan 2012) 40. See also Michael Doyle, ‘Kant, Liberal Legacies, and Foreign Affairs’ (1983) 12 Phil & Pub Aff 205, 207-08; Bhikhu Parekh, ‘The Cultural Particularity of Liberal Democracy’ in David Held (ed), *Prospects for Democracy. North, South, East, West* (Polity Press 1993) 163.

subscribed to the latter as he suggested that equality requires that all individuals have the same share in lawmaking and this is the point where traditional liberalism and democracy meet.⁴⁵ Likewise, Green and Axtmann observed that the notion of liberty is not restrained to negative liberty but also entails the positive capacity of self-empowerment to have a real say in political issues of one's country.⁴⁶ Similar understanding of liberalism as 'welfare' rather than 'unfettered individual choice of action' is also endorsed by a wide plurality of other scholars.⁴⁷ It means that there is no contradiction between liberalism and democracy but, on the contrary, they must be reconciled to ensure the balance between public and private spheres, the 'liberty of ancients' and the 'liberty of moderns'.⁴⁸ Berlin, conversely, criticised such a far-reaching reading of liberty. For him, 'liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quite conscience'.⁴⁹ While Berlin's argument is not framed in terms of the substantive/procedural definition divide, it is illustrative of difficulties arising from attempts to bridge democracy and classical liberalism without references to substantive values — notion hostile to the classical liberal movement. Be that as it may, the very democratic theory is premised on such liberal assumptions as the importance of consent by virtue of the moral primacy of the individual, the vital role of critical argument and ideological diversity as prerequisites for the discovery of truth. Moreover, equality before the law, a central pillar of liberal philosophy, demands that all citizens have the same share in making the law.⁵⁰ Consequently, the philosophy of liberalism, 'contains within itself the seeds of its own democratization', as it is centred not only on the idea of individual rights and limited government but also on the idea of human equality: men can only be free when they are equal in their natural rights.⁵¹ Genuine democracy is, therefore, inconceivable without the ideals of liberal society where the protection of the rights of minorities is as essential as 'government by the people' adjoined in majority.

Another point of friction between liberalism and democracy, closely linked to the previous one, is the question of the extent and form of democratisation. Indeed, classical liberal theory has been historically profoundly hostile to

⁴⁵ Friedrich A Hayek, *The Constitution of Liberty* (Routledge 1960) 103.

⁴⁶ Thomas H Green, 'Liberal Legislation and Freedom of Contract' in Paul Harris and John Morrow (eds), *Lectures on the Principles of Political Obligation and Other Writings* (CUP 1986) 202; Ronald Axtmann, *Democracy: Problems and Perspectives* (Edinburgh UP 2007) 65.

⁴⁷ Thinkers that are associated with 'reform' liberalism include John Hobson, TH Green, LT Hobhouse, Louis Brandeis, John Dewey, John Maynard Keynes, John Kenneth Galbraith, Lester Thurow, Robert Reich and John Rawls. See Milja Kurki, *Democratic Futures: Revisioning Democracy Promotion* (Routledge 2013) 44-50. See also Conrad Waligorski, *Liberal Economics and Democracy: Keynes, Galbraith, Thurow, and Reich* (UP of Kansas 1997) 11-17; Michael Freedman, *Ideologies and Political Theory: A Conceptual Approach* (OUP 1998) 447.

⁴⁸ Wilfred Nippel, *Ancient and Modern Democracy: Two Concepts of Liberty?* (CUP 2016) 204-11, 348-50.

⁴⁹ Isaiah Berlin, *Four Essays on Liberty* (OUP 1969) 124-31.

⁵⁰ Friedrich A Hayek, *The Constitution of Liberty* (Routledge 1960) 103.

⁵¹ Marc F Plattner, 'From Liberalism to Liberal Democracy' (1999) 10 *Journal of Democracy* 121, 123.

democracy. Consider, for example, undemocratic liberal states in European history, in which popular control of government did not include all the people.⁵² More recently, the rise of illiberal democracy⁵³ in the twentieth century, where citizens are institutionally empowered to political participation but face *de facto* restrictions on their liberties, put the discussion about the 'natural' link between liberalism and democracy under even more strain. However, it is fair to suggest that the modern notion of democracy is intrinsically linked to liberalism at least to the extent that free elections require individual freedoms of speech, assembly and association to be protected, not to mention the fact that the idea of representative government animates liberalism since its very emergence. If these liberties are infringed, then the democratic nature of the polity is to be reconsidered. Moreover, it is precisely the idea that liberty assumes equality which makes it virtually impossible for non-democratic liberalism to assert itself in the contemporary world.⁵⁴ All in all, it is clear from the preceding analysis that the link between democracy and liberalism has evolved from a contested one to the one of compatibility and mutual dependence.

A similar theoretical tension is observable between democracy and constitutionalism. It is commonly asserted that '[d]emocracy without constitutional liberalism is not simply inadequate, but dangerous bringing with it the erosion of liberty, the abuse of power, ethnic divisions, and even war'.⁵⁵ However, a closer examination of the two conceptions reveals their variant and even contradictory agendas. Constitutionalism as a doctrine implies the existence of a legally enshrined set of core rules and principles of high importance regulating the exercise of state power and unsusceptible to change by simple majority. Democracy, on the other hand, envisages mass political participation. It is, thus, people themselves, or *pouvoir constituant*, who vest political organisation of a state with legitimacy and authority. Therefore, it seems conceptually untenable to speak of constitutional democracy since constitutionalism with its idea of constitution as a higher law is a direct constraint on people's will-formation, particularly considering the fact that constitutions of many democratic states have disenfranchised significant portions of populations and installed limits on the exercise of the popular will through, *inter alia*, establishment of the institution of indirect representation.⁵⁶ Moreover, would-be autocrats can employ the tools of constitutional change,

⁵² Marc F Plattner, *Democracy without Borders? Global Challenges to Liberal Democracy* (Rowman and Littlefield 2008) 64-65. See generally Adam Przeworski, 'The Neoliberal Fallacy' (1992) 3 *Journal of Democracy* 45; Tim D Muzio, 'The Liberal Renaissance and the End(s) of History' (2012) 15 *J Int'l Rel & Dev* 158.

⁵³ See generally Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76 *Foreign Aff* 22.

⁵⁴ Marc F Plattner, 'From Liberalism to Liberal Democracy' (1999) 10 *Journal of Democracy* 121, 131.

⁵⁵ Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76 *Foreign Aff* 22, 41-42.

⁵⁶ Richard Bellamy, *Political Constitutionalism* (CUP 2007) 90-91. See also Jurgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29 *Pol Theory* 766, 766.

such as constitutional amendment and constitutional replacement,⁵⁷ to disrupt democratic regime, the most obvious example being the Nazi overthrow of Weimar Germany.

The majority of scholarship, however, tend to uphold the intrinsic compatibility between constitutionalism and democracy. Constitutionalism and democracy, as the argument runs, should go hand in hand for the former merely codifies the latter: 'Not even a democratic government could abrogate or infringe such a constitution without abolishing or detracting from democracy itself'.⁵⁸ To put it differently, '[d]emocracy is constituted by values, such as autonomy and equality, and rules, such as one person one vote, that it does not itself create. If so, then the belief that the constitutional rules defining democracy cannot be curtailed even by the demos itself still holds'.⁵⁹ Legitimacy of constitutionalism in fact relies on its democratic pedigree. Any change to the constitution, except for revolution, can only be effectuated through democratic process. It is democracy that bounds together the constituent and the constituted powers so that the latter exercises its mandate in a fair and transparent way and can be removed should it surpass its mandate or in any other way frustrate the expectations of the constituent power.⁶⁰

Ultimately, it is imperative to trace the nexus between liberalism and constitutionalism, since liberal constitutionalism is often treated as synonymous with constitutionalism itself and, pursuant to the dominant view in political science, constitutes an inalienable element in the modern definition of democracy. It is based on an idea that human beings have certain inalienable rights and that governments must enshrine those in a binding instrument that would restrict the power of the agency responsible for enforcement of these rights. However, the rise of a so-called 'non-liberal constitutionalism', also referred to as 'authoritarian constitutionalism' and 'abusive constitutionalism',⁶¹ which describes the polity which has a constitution but does not practice constitutionalism (the rule of law, democratic elections and judicially enforceable rights), such as e.g. North Korea and China,⁶² reverses

⁵⁷ See generally David Landau, 'Abusive Constitutionalism' (2013) 47 UC Davis L Rev 189.

⁵⁸ Richard Bellamy, *Political Constitutionalism* (CUP 2007) 90. The same view is held by Dieter Grumm, 'The Achievement of Constitutionalism and Its Prospects in a Changed World' in Petra Dobner and Martin Loughlin (eds), *Twilight of Constitutionalism* (OUP 2010) 10.

⁵⁹ Richard Bellamy, *Political Constitutionalism* (CUP 2007) 91. See also Marcus Llanque, 'On Constitutional Membership' in Petra Dobner and Martin Loughlin (eds), *Twilight of Constitutionalism* (OUP 2010) 175.

⁶⁰ Aoife O'Donoghue, *Constitutionalism in Global Constitutionalisation* (CUP 2014) 43.

⁶¹ Graham Walker, 'The Idea of Nonliberal Constitutionalism' in Ian Shapiro and Will Kymlicka (eds), *Ethnicity and Group Rights* (NYU Press 1997) 154, 169; Stephen Holmes, 'Constitutions and Constitutionalism' in Michel Rosenfeld and Andras Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 200-02; Li-Ann Thio, 'Constitutionalism in Illiberal Polities' in Michel Rosenfeld and Andras Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 134-36, 146-47; David Landau, 'Abusive Constitutionalism' (2013) 47 UC Davis L Rev 189; Mark Tushnet, 'Authoritarian Constitutionalism' (2014-2015) 100 Cornell L Rev 391.

⁶² Both North Korea and China have written constitutions but their constitutions have been guided by political ideologies disallowing questioning the validity of their legal and political

this taken-for-granted relationship by denying the intrinsic bond between liberalism and constitutionalism. In other words, whilst liberalism necessarily presupposes the existence of a constitution acting as a safeguard against government encroachment upon individual rights, constitutionalism can perfectly dispense with liberalism by failing to either codify liberal guarantees or to put them in practice. In this sense, constitutionalism, normally associated with the instalment and consolidation of liberal democracies, may in some cases reduce democracy to electoral authoritarian regime. This antinomy calls for more rigorous justification to place the two doctrines under the banner of democracy. Some scholars raised the question of legitimacy of a constitution, contending that legitimate constitutions share a number of universal common characteristics, such as procedural (against arbitral use of power) and substantive (restricting the scope of policy choices that governments can make) limitations.⁶³ Be this as it may, these limitations can only be upheld in democratic process. Thus, it is the democratic setting where individual freedoms can be safeguarded by individuals themselves through institutions of self-government (such as voting and representation) that liberalism and constitutionalism can benefit from each other and thereby unleash their fullest potential. Henceforth, while the link between liberal and constitutional traditions is at times a fragile one, it is held together by the democratic thesis implying constitutional entrenchment of substantive liberties as well as procedural guarantees of a fair democratic process.

Importantly, some scholars question the modern 'unreflected' confinement to the liberal democratic theory tradition⁶⁴ by pinpointing to alternative models, such as, for example, participatory democracy,⁶⁵ radical democracy,⁶⁶ deliberative democracy⁶⁷ or cosmopolitan democracy,⁶⁸ not to mention various arguments for feminist, green and even Islamist and Confucian models of

authority. Moreover, they lack independent judicial review and the workable mechanism of checks and balances.

⁶³ See eg Larry Cata Backer, 'Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering' (2009) 16 J Global Legal Stud 85, 85-86, 89.

⁶⁴ Milja Kurki, *Democratic Futures: Revisioning Democracy Promotion* (Routledge 2013) 18 ('A liberal democratic background discourse has been dominant in much of academic study as well as practice of democracy and democratisation and, as a result, contestedness of the nature of democracy has received rather a formal and limited recognition only').

⁶⁵ Questions the elitists forms of representation in liberal democracy and focuses on multiple levels of participation. See Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age. 20th Anniversary Edition* (University of California Press 2003).

⁶⁶ Focuses on social movement interactions rather than party politics. See Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy* (Verso 1993).

⁶⁷ Places emphasis on dialogue and seeks to ensure not only greater role for citizens in democratic politics but also more efficient and responsive government. See Mark Warren, *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (CUP 2008).

⁶⁸ Suggests that meaningful democracy within a state can only be achieved if global politics are also democratised. See Heikki Patomäki and Teivo Teivainen, *Possible World: Democratic Transformation of Global Institutions* (Zed Books 2004).

democracy.⁶⁹ One of the earliest hints of this ‘pluralising’ debate can be found in the work of Schmitter and Karl, who argue that democracy can take various meanings and institutional forms and that different kinds of democracies are not more or less democratic with regard to each another but democratic in different ways.⁷⁰ More recently, Kurki similarly suggested that the concept of democracy is ‘open-ended, dynamic, normative, and inherently critical of existing structures’ and that particular models of democracy arise in particular settings and in response to specific political struggles.⁷¹ Whilst the capability of democracy to absorb a plurality of meanings to fit national specificities is essential for its universality, one should not forget that ‘alternative’ models of democracy use liberal model as their starting point and build on its weaknesses. As Youngs acknowledged, ‘[i]f given a list of Western democracy’s basic elements, people in developing states will usually acknowledge that they want similar attributes, such as choosing their leaders, enjoying basic rights of free and fair expression, and benefiting from the rule of law’ but with local attachments.⁷² As a result, it is not clear whether any distinctive non-Western model of democracy exists. Any attempt to do completely away with the liberal-constitutional core results in such impoverishment of the concept of democracy that it does not any more represent an effective bulwark against authoritarianism. In other words, core attributes of democracy, such as liberalism and constitutionalism, are so essential to its distinctive normative authenticity that they cannot be totally dispensed with but rather carefully adjusted to respond to local political, social, cultural and economic realities.

All in all, whereas broad liberal-constitutional parameters of the notion of democracy are now widely accepted, the understanding of the cluster concept ‘liberal democracy’ is far from straightforward. This is due to the fact that democracy is a contested notion not only between advocates of different models of democracy, but also among protagonists of the liberal model. The subsequent sections will attempt to decipher this ambiguity.

⁶⁹ See Carole Pateman, *The Disorder of Women* (Polity Press 1989); Larbi Sadiki, *In Search of Arab Democracy: Discourses and Counter-discourses* (Hurst and Company 2004); Daniel Bell, *Beyond Liberal Democracy: Political Thinking for East Asian Context* (Princeton UP 2006); Mathew Humphrey, *Ecological Politics and Democratic Theory* (Routledge 2007). For a more general overview, see David Held, *Models of Democracy* (3rd edn, Polity Press 2006).

⁷⁰ Philippe C Schmitter and Terry Lynn Karl, ‘What Democracy Is and Is Not’ in Larry Diamond and Marc F Plattner (eds), *Democracy: A Reader* (The Johns Hopkins UP 2009) 11.

⁷¹ Mirja Kurki, ‘Democracy and Conceptual Contestability: Reconsidering Conceptions of Democracy in Democracy Promotion’ (2010) 12 *Int’l Stud Rev* 362, 374, 379.

⁷² Richard Youngs, *The Puzzle of Non-Western Democracy* (Carnegie Endowment for International Peace 2015) 21.

3.3. Democracy in International Law: A Prevalent Procedural Conception

It is clear from the above discussion that political science lacks a coherent understanding of democracy. Conversely, international law does not strive to propound one paradigmatic definition, or theory, of democracy. In words of the UN Secretary-General, '[d]emocracy is not a model to be copied but a goal to be attained. Furthermore, the pace at which democratization can proceed is dependent on a variety of political, economic, social and cultural factors proper to the circumstances of a particular culture and society'.⁷³ To put it differently, international law does not outline specific modalities of being democratic, such as, for example, electoral system, form of government (monarchy or republic) and system of government (parliamentarism, presidentialism or mixed system) etc.⁷⁴ Rather it gauges democratisation by reference to the principles of political equality and popular sovereignty. Thus, in international legal parlance state is democratic if it rules with the consent of the governed. Because it is close to impossible to empirically validate the implementation of these principles, one turned to the institution of elections as the main benchmark against which to measure the degree of democratisation. Wheatly's definition of democracy is illustrative in this respect: 'A democratic system of government is one in which the principles of popular sovereignty and political equality find expression in free and fair elections and popular participation in the political process'.⁷⁵ This election-centred approach of international law to the issue of democracy mirrors the procedural understanding of democracy in political science.

That said, the discussion of democracy in international law is often reduced, albeit unintentionally, to its liberal procedural understanding and revolves around the question of elections and their compatibility with international human rights standards. It is, thus, international human rights framework that serves as the most fertile ground for the debate on democracy in international law. There are several ways in which international legal scholars approached the question of democracy. First, democracy is derived from already established list of international human rights, such as a right to political participation, right to free and fair elections and a set of adjacent rights, such as rights to freedom of peaceful assembly, association, opinion and expression. Thomas Franck and Gregory Fox are commonly viewed as the founders of the idea of democracy as an emerging entitlement. In his path-breaking article, Franck conceptualised the international legal definition of

⁷³ UNGA, 'Report of the Secretary-General on Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies' (1997) UN Doc A/52/513, para 27.

⁷⁴ See eg Henry J Steiner, 'Two Sides of the Same Coin? Democracy and International Human Rights' (2008) 41 *Israel L Rev* 445, 459.

⁷⁵ Steven Wheatly, 'Democracy in International Law: A European Perspective' (2002) 51 *ICLQ* 225, 231.

democracy as ‘the kind of governance that is legitimated by the consent of the governed’.⁷⁶ He identified the normative evolution of the universal democratic entitlement by pointing out to three sequential ‘generations’ of international rule-making and implementation: the right of self-determination (the period following the First World War); international legal recognition of human rights (since the Second World War); and the right to free and open elections (a post Cold-War period).⁷⁷ According to him, the right to democratic governance derived from the right of self-determination, freedoms of expression, thought, assembly and association, and the right to political participation.⁷⁸ Franck acknowledged the minimalist character of democracy conceived in this way and yet admitted that it is ‘the limit of what the still frail system of states can be expected to accept’.⁷⁹ However, in order to avoid the complete conceptual merger of democracy with electoral method, Franck added qualifiers ‘free’ and ‘fair’ to the notion of elections.⁸⁰

Fox, for his part, equated ‘democracy’ with a right to political participation through the institution of elections and claimed that this right is now firmly embedded in both treaty law and international practice.⁸¹ Hence, similarly to Franck, he subscribed to the procedural definition of democracy, where the right to political participation is adequately realised through elections. Other scholars followed suit and are now dubbed as adherents of the ‘democratic entitlement school’.⁸² This school of thought revolved around the idea that conceptualising democracy as a global entitlement represents ‘a revolutionary

⁷⁶ Thomas Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86 AJIL 46, 75.

⁷⁷ *ibid* 52.

⁷⁸ *ibid*.

⁷⁹ *ibid* 90.

⁸⁰ The point is borrowed from Richard Burchill, ‘The Developing International Law of Democracy’ (Review Article) (2001) 64 MLR 123, 128.

⁸¹ Gregory H Fox, ‘The Right to Political Participation in International Law’ in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 48-90.

⁸² See eg Henry Steiner, ‘Political Participation as a Human Right’ (1988) 1 Harv Hum Rts YB 77; Fernando Teson, ‘The Kantian Theory of International Law’ (1992) 92 Colum LR 53; Christina Cerna, ‘Universal Democracy: An International Legal Right or a Pipe Dream of the West?’ (1995) 27 NYU J Int’l Law & Pol 289; Gregory Fox and Georg Nolte, ‘Intolerant Democracies’ (1995) 36 Harv Int’l LJ 1; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) 311; Obiora C Okafor, ‘The Concept of Legitimate Governance in the Contemporary International Legal System’ (1997) 64 Neth Int’l L Rev 33; James Crawford, ‘Democracy and the Body of International Law’ in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000); Linos-Alexandre Sicilianos, *L’ONU et la démocratisation de L’État: systèmes régionaux et ordre juridique universel* (Pedone 2000); Ben Achour, ‘Le droit international de la démocratie’ (2000) 4 CEBDI 325; Linos-Alexandre Sicilianos, ‘Les Nations unies et la démocratisation de l’État: nouvelles tendances’ in Rostane Mehdi (ed), *La Contribution des nations unies a la démocratisation de l’État* (Pedone 2002); Steven Wheatly, *Democracy, Minorities and International Law* (CUP 2005) ch 3; Patrick Thornberry, ‘The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism’ in Christian Tomuschat (ed), *Modern Law of Self-Determination (Developments in International Law)* (first published 1993, Martinus Nijhoff 2012); Carol G Gould, ‘The Human Right to Democracy and Its Global Import’ in Cindy Holder and David Reidy (eds), *Human Rights: The Hard Questions* (CUP 2013); Khalifa A Alfadhel, *The Right to Democracy in International Law* (Routledge 2017).

transformation of a full array of international norms, from norms governing recognition of States and governments to those governing the use of force'.⁸³ While some of them go beyond thin procedural understanding of democracy by appealing to other strata of human rights as well as principles of political equality and genuine empowerment, they equally come to conclusion, whether implicitly or explicitly, that democracy as a form of government based on the consent of the governed is realised through electoral process.

If low intensity democracy is the only credible solution in a heterogeneous world of the 190-plus states, what is then the value of democracy as a self-standing right given its close alignment with the already extant human rights framework? It is, in fact, against this backdrop that substantive definition makes its purchase in international law. As d'Aspremont pointedly noted, the procedural definition of democracy is concerned exclusively with the origin of power and fails to take into account the way power is exercised.⁸⁴ This makes democracy toothless against non-democratic actors seeking to manipulate democratic procedures and institutions to advance ideas hostile to democratic ideals, the most prominent examples being the rise of the German Nazi party in the early 1930s and the victory of the Islamic Salvation Front in the 1991 Algerian elections.⁸⁵ It follows that the legal definition of democracy, apart from being premised on the institution of elections, should also include certain substantive elements, namely respect for the basic political rights and freedoms and the rule of law.

The substantive account of democracy can be found in the number of reports and declarations of the international bodies. For instance, the Vienna Declaration and Programme of Action defined democracy as the one 'based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives'.⁸⁶ The Vienna Declaration further stated that 'democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing'.⁸⁷ Another example is the Secretary-General's relaxed approach to the notion of democracy: '[I]t is through

⁸³ Gregory H Fox and Brad R Roth, 'Democracy and International Law' (2001) 27 Rev Int'l Stud 327, 335-36. See also Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 AJIL 866; Anthony D'Amato, 'The Invasion of Panama Was a Lawful Response to Tyranny' (1990) 84 AJIL 516; Louis Fieldig, 'Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy' (1995) 5 Duke J Comp & Int'l L 329; Fernando Teson, 'Collective Humanitarian Intervention' (1996) 17 Mich J Int'l L 323; Fernando Teson, 'The Liberal Case for Humanitarian Intervention' in JL Holzgrefe and Robert O Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (CUP 2003) 93-129.

⁸⁴ Jean d'Aspremont, 'Legitimacy of Governments in the Age of Democracy' (2006) 38 NYUJ Int'l L & Pol 877, 894.

⁸⁵ For a more detailed overview, see Gregory H Fox and George Nolte, 'Intolerant Democracies' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 391.

⁸⁶ UNGA, Vienna Declaration and Programme of Action (12 July 1993) UN Doc A/CONF.157/23, para 8.

⁸⁷ *ibid.*

democracy that individual and collective rights, the rights of persons and the rights of peoples, can be reconciled'.⁸⁸ In this sense, democracy is understood as being based on tolerance and non-violence, including peaceful transfer of power.⁸⁹ Moreover, the UN Secretary-General has explicitly asserted that '[t]he UN has long advocated a concept of democracy that is holistic: encompassing the procedural and the substantive; formal institutions and informal processes; majorities and minorities [...] the political and the economic [...]'.⁹⁰ Similarly, the UNGA contributed to the extension of the right to democracy beyond its minimalist understanding. It asserted that the 'will of the people' is the best assurance for the protection of fundamental rights and freedoms⁹¹ and that the protection of human rights and democratic governance are 'interlinked' and 'mutually reinforcing'.⁹² It further identified such 'essential elements of democracy' as respect for human rights and fundamental freedoms, including the right to vote and freedoms of assembly, expression and opinion, as well as political pluralism, respect for the rule of law, the separation of powers, the independence of judiciary, transparency and accountability in public administration and free media.⁹³

The scholarly community too embraced the substantive conception of the democratic entitlement and apart from the notions of the rule of law, general respect for human rights and multi-party system, added the elements of human dignity and redistributive justice in the form of socio-economic rights to the substantive definition.⁹⁴ Such initiatives are definitely laudable and afford a richer understanding of the notion of democracy and its elevated conceptual sustainability but they bear a risk of being over-inclusive. Equating democracy with all sorts of social virtues makes of democracy an abstract idea, a general principle, an overall ideal, if you wish, and hence an empty concept. Roth's scepticism against a substantive view of democracy merits lengthy quotation:

'Democracy' has in recent parlance been transmogrified into a repository of political virtues: rule ratified by a manifestation of majority will (popular

⁸⁸ Boutros Boutros-Ghali, *An Agenda for Democratization* (United Nations 1996) 9, para 23.

⁸⁹ *ibid* 8, para 21.

⁹⁰ UNSG, Guidance Note of the Secretary-General on Democracy (September 2009) 2 <http://www.un.org/democracyfund/sites/www.un.org.democracyfund/files/file_attach/UNSG%20Guidance%20Note%20on%20Democracy-EN.pdf> accessed 6 June 2017.

⁹¹ United Nations Millennium Declaration, UNGA Res 55/2 (8 September 2000) UN Doc A/RES/55/2, para 6.

⁹² World Summit Outcome, UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, art 135.

⁹³ UNGA Res 59/201 (20 December 2004) UN Doc A/RES/59/201, para 1.

⁹⁴ William I Robinson, *Promoting Polyarchy: Globalization, US Intervention and Hegemony* (CUP 1996) 59; Jack Donnelly, 'Human Rights, Democracy and Development' (1999) 21 Hum Rts Q 608; Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (OUP 2000) 110; Gregory H Fox and George Nolte, 'Intolerant Democracies' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 434; David Held, *Models of Democracy* (3rd edn, Polity Press 2006) 264; Frithjof Ehm, 'The Democracy Obligation According to International Law' (Völkerrechtsblog, 22 February 2016) <<http://voelkerrechtsblog.org/the-democracy-obligation-according-to-international-law/>> accessed 5 June 2016.

sovereignty); orderly mediation of political conflict through participatory mechanisms (polyarchic constitutionalism); individual freedom under the rule of law (liberalism); broad popular empowerment to affect the decisions that condition social life (democracy, properly so called); *et cetera*. No term can mean so many things and continue to mean anything, for political virtues do not come in neat packages.⁹⁵

For Roth, the pleas to coin a substantive definition of democracy, however well-minded, are ideological and should not be transferred to the realm of international law.⁹⁶

Another common way to tie democracy to the existing framework of international law is to posit that it flows from the principle of (internal) self-determination.⁹⁷ It has been argued that self-determination, through its incorporation into common article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), gained an internal dimension. The articles stipulate that '[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.⁹⁸ There are two main approaches to derive democracy from the principle of (internal) self-determination. According to the contextual approach, article 1 ICCPR is to be interpreted in light of the Covenant's other democratic provisions, such as, for instance, article 25. On this view, the right to political participation through the institution of elections shapes the modalities of the realisation of the principle of self-determination.⁹⁹ The second approach attempts to find a logical nexus between self-determination and democracy. Accordingly, people as the only holders of the right to determine their political status (in the post-colonial setting) can solely realise this right by democratic means.¹⁰⁰ This also suggests

⁹⁵ Brad R Roth, 'Democratic Intolerance: Observations on Fox and Nolte' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 441.

⁹⁶ *ibid* 442.

⁹⁷ Patrick Thornberry, 'The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism' in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff 1993) 134-37; Allan Rosas, 'Internal Self-Determination' in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff 1993) 249; Antonio Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (CUP 1995) 311; Steven Wheatly, *Democracy, Minorities and International Law* (CUP 2005) 135-36; Hua Fan, 'The Missing Link between Self-Determination and Democracy: The Case of East Timor' (2008) 6 Nw J Int'l HR 176.

⁹⁸ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 1; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 1.

⁹⁹ Niels Petersen, 'The Principle of Democratic Teleology in International Law' (2009) 34 Brook J Int'l L 33, 50. See also Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal* (CUP 1995) 53.

¹⁰⁰ Niels Petersen, 'The Principle of Democratic Teleology in International Law' (2009) 34 Brook J Int'l L 33, 51. See also Hua Fan, 'The Missing Link between Self-Determination and Democracy: The Case of East Timor' (2008) 6 Nw J Int'l HR 176, 178.

that self-determination is not only about the capacity to choose certain political direction at any given moment but also about the capacity to choose on an ongoing basis, which inevitably privileges democratic forms of government. Additionally, people who are denied the right of equal access to governmental institutions and placed in a position of subordination in relation to the numerical majority of population are arguably entitled to the right of remedial secession. In this sense, the doctrine of remedial secession is but one of the logical links between self-determination and democracy: 'The "democratic" aspect of self-determination is present in muted form, through the idea of representation'.¹⁰¹

Third, some quarters of scholarly community suggest that states are now customarily obliged to be democratic without such an obligation taking the form of a human right or embodying the internal aspect of the principle of self-determination. For instance, d'Aspremont, the most prominent representative of this view, stresses out that while it is clear that free and fair elections presuppose the minimum respect for civil and political rights, states are under a customary obligation to be democratic solely to the extent that their leaders are chosen by means of free and fair elections.¹⁰² To paraphrase what d'Aspremont postulated, states are rather internationally obliged to hold free and fair elections than to install a fully-fledged democratic regime. Finally, some hold a view that international law does not contain either a strict right to democracy or a customary obligation to conduct elections, but merely a principle of democratic teleology, or a right to the emergence of democratic government, according to which states are obliged to gradually develop towards democracy and counter democratic regressions.¹⁰³ Simplifying somewhat, this can be regarded as an obligation of conduct rather than that of result.

There is also a distinct group of scholars, particularly those outside the United States, resisting the international democratic parlance *tout court*. For them, the emergence of a new human right to democracy seems little more than a proxy for wishful thinking of a narrow circle of international scholarship than a legal reality.¹⁰⁴ To illustrate, while acknowledging the link between human rights and democracy as one of 'mutual dependence', Susan Marks and

¹⁰¹ Patrick Thornberry, 'The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism' in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff 1993) 120. For a more detailed discussion of the doctrine of remedial secession, see James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2007) 118-21. For a thorough account of the academic support for remedial secession, see Antonello Tancredi, 'A Normative "Due Process" in the Creation of States through Secession' in Marcelo G Kohen (ed), *Secession: International Law Perspectives* (CUP 2006).

¹⁰² Jean d'Aspremont, 'Émergence et déclin de la gouvernance démocratique en droit international' (2009) 22 RQDI 57, 65; Jean d'Aspremont, 'The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks' (2011) 22 EJIL 549, 556-57.

¹⁰³ Niels Petersen, 'The Principle of Democratic Teleology in International Law' (2009) 34 Brook J Int'l L 33, 82-84.

¹⁰⁴ Brad R Roth, 'Evaluating Democratic Progress' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 512.

Andrew Clapham concluded that democracy cannot be proclaimed as a human right of itself. Rather, it can be viewed as ‘an argument, a critical tool, and a set of principles for political life in all its multifarious settings’.¹⁰⁵ Likewise, Henry Steiner views the problem of a human right to democracy as one of incompatible categories, despite their parallel evolution and histories: on his account, human rights have a much richer texture and a consistent quality reflected in legal principles; while democracy lies at the intersection of law and politics.¹⁰⁶ The paucity and inconsistency of state practice in supporting a ‘new right’ to democracy has also lead James Crawford to resist to the notion of democracy as a universal entitlement.¹⁰⁷ In a similar vein, Steven Wheatley suggests that no democracy has emerged in international law and international instruments do not generally identify any such right.¹⁰⁸ The view of Jean d’Aspremont is even more provocative:

En effet, à l’exception des systèmes régionaux de protection des droits de la personne humaine, la pratique contemporaine démontre un affaiblissement graduel de l’exigence relative à l’origine démocratique des gouvernements, l’accent étant désormais mis sur les exigences de transparence, l’absence de corruption (bonne gouvernance), et le respect des droits de l’homme. Après presque deux décennies d’attention portée à l’origine démocratique des gouvernements, il semble que nous assistions aujourd’hui à un retour de politiques étrangères exclusivement centrées sur les vertus relatives à la *manière* dont les gouvernements exercent leur pouvoir et non plus l’*origine* démocratique de leur pouvoir.¹⁰⁹

For d’Aspremont, the international legal practice is now less concerned with how governments are installed and more how they exercise their power. It effectively means that the international community seems to have done away with democracy as a principle and replaced it with a more obscure and legally indeterminate euphemism ‘good governance’.

On other fronts, there are concerns that given the historical record of imperial ideas, there is a cause to beware that the so-called ‘right to democracy’

¹⁰⁵ Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (OUP 2005) 68-70.

¹⁰⁶ Henry J Steiner, ‘Two Sides of the Same Coin? Democracy and International Human Rights’ (2008) 41 *Israel L Rev* 445, 456ff.

¹⁰⁷ James Crawford, *Creation of States in International Law* (2nd edn, OUP 2007) 153ff.

¹⁰⁸ Steven Wheatly, *The Democratic Legitimacy of International Law* (Hart Publishing 2010) 221.

¹⁰⁹ ‘Indeed, with the exception of the regional systems for the protection of human rights, international practice displays a gradual weakening of the requirement concerning the democratic origin of governments. Instead, an emphasis is placed on the requirements of transparency, absence of corruption (good governance) and respect for human rights. After almost two decenniums of preoccupation with the democratic origin of governments, it seems we are moving back to the foreign policies centred exclusively on the virtues relating to the manner governments exercise their power and not democratic origin thereof’. Jean d’Aspremont, ‘Émergence et déclin de la gouvernance démocratique en droit international’ (2009) 22 *RQDI* 57, 68 (author’s translation).

would become an apology for intervention in internal affairs of the weak¹¹⁰ and would occasion disruption of the UN system based on the principles of state sovereignty, equality and non-interference.¹¹¹ It has been said that a norm of democratic governance amounts to a 'liberal-democratic *jihad*',¹¹² a 'new ideology of imperialism'¹¹³ that is apt to serve simply as a 'call for contextual management of far-away societies in reference to Western-liberal policies'.¹¹⁴ Notably, Third World international lawyers have expressed a wariness about explicitly endorsing democracy as an international norm given the fact that colonial era distinction between civilised and barbarian states is now seemingly re-framed in terms of liberal democratic and illiberal undemocratic states.¹¹⁵ Carothers puts this point starkly: 'Advocacy of a democratic norm actually highlights [the] West versus non-West division and the tension in international law concerning the fact that it is at root a Western system that Western countries are seeking to apply to the whole world'.¹¹⁶

Moreover, designating democracy as the only rational model of governance, and, ultimately, universal human right, is premature and fails to accommodate different historical, social and economical backgrounds of a plurality of countries. Indeed, it has been submitted that no one claimed the right to democracy in, say, 1980, albeit the foundations for such discussion had already been laid down in 1948 when the Universal Declaration of Human Rights was adopted: 'What has resulted is a retroactive emergence of a legal principle of democracy'.¹¹⁷ It is also pertinent to recall the alleged incapability of the modern representative democracy to advance genuine participation of citizens, which is all too often reduced to a mere vote casting once every four or five years for representatives that are too distant and ineffective to further their citizens' interests.¹¹⁸ Finally, democratic regime can violate rights,

¹¹⁰ Thomas Carothers, 'Empirical Perspectives on the Emerging Norm of Democratic Governance' (1992) 86 ASIL Proc 261, 264; Martti Koskeniemi, "'Intolerant Democracies': A Reaction' (1996) 37 Harv Int'l L J 231, 231-34. Franck too acknowledges this concern. Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 AJIL 46, 46-91.

¹¹¹ Jose Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory' (2001) 12 EJIL 183.

¹¹² Brad Roth, 'Popular Sovereignty: The Elusive Norm' (1997) 91 ASIL Proc 363, 368.

¹¹³ Frank Furedi, *The New Ideology of Imperialism: Renewing the Moral Imperative* (Pluto Press 1994).

¹¹⁴ Martti Koskeniemi, "'Intolerant Democracies': A Reaction' (1996) 37 Harv Int'l L J 231, 233.

¹¹⁵ Bhupinder S Chimni, 'Legitimizing the International Rule of Law' in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 301. See also Rein Mullerson, *Regime Change: From Democratic Peace Theories to Forcible Regime Change* (Martinus Nijhoff 2013) 33.

¹¹⁶ Thomas Carothers, 'Empirical Perspectives on the Emerging Norm of Democratic Governance' (1992) 86 ASIL Proc 261, 264.

¹¹⁷ Richard Burchill, 'The Developing International Law of Democracy' (Review Article) (2001) 64 MLR 123, 124.

¹¹⁸ For a compelling argument, see generally James Tully, 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy' (2002) 65 MLR 204.

especially of minorities, and tolerate social disparities.¹¹⁹ While democracy presents itself as inclusive, empowering and dedicated to the promotion of equality, it may also be used by powerful groups to install their domination over larger society.¹²⁰

The above-listed criticisms of the democratic entitlement thesis largely relate to the lack of consensus on the definition of democracy. On the one hand, democracy is equated to the maintenance of free, fair and periodic elections based on universal suffrage and, therefore, its normative value as a means of empowerment and political equality is reduced to zero. Because it is simply concerned with the way the power is established and fails to account for the way the power is exercised, procedural understanding of democracy makes the right toothless against abuse and manipulation by anti-democratic actors. On the other hand, the concept of democracy is overtly ideological and, as result, suspect as a neocolonialist strategy. A distinctive strategy of some scholars to deny any legal standing to democracy in international law is both an outcome of such conceptual confusion as well as an attempt to avoid delving into the complex discussion of sensitive political issues animating the concept of democracy. A novel approach to the definition of democracy is thus due.

3.4. Towards the Limited Substantive Conception

In light of the above said it seems like any attempt to construct a definition of democracy in international law is hampered by an inherent paradox: democracy reduced to electoral process, however free and fair, does not bring anything new to the table as international and regional human rights instruments already contain a minimum set of civil and political rights and freedoms guaranteeing participation in elections, non-discrimination, free press, free speech etc. Democracy elevated to the rank of social virtue encompassing all achievements of liberalism and constitutionalism from the rule of law to good governance means too much and, thus, barely anything. Moreover, the liberal aspect of the term ‘liberal democracy’ and its relationship to the democratic aspect is still a matter of debate within international legal circles. Global constitutionalism as a legal approach does not provide for a grandiose solution to this conundrum. However, it entails a certain set of assumptions when it comes to the doctrines of liberalism and constitutionalism which, in turn, shape the definition of democracy.

First, global constitutionalism as a subspecies of new liberalism does not accept just any type of liberalism. For democracy to be meaningful, it is not enough for state to guarantee negative liberty. To ensure genuine empowerment and equality — two core values of democracy — a different

¹¹⁹ Brad R Roth, ‘Evaluating Democratic Progress’ in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 497.

¹²⁰ Richard Burchill, ‘The Promotion and Protection of Democracy by Regional Organizations in Europe: The Case of Austria’ (2001) 7 EPL 79, 82.

strand of rights should be guaranteed in addition to traditional civil and political rights, namely socio-economic rights. It means that real democracies are social-welfare democracies, which apart from securing freedom from arbitrary authority (negative freedom) also ensure proper conditions for exercising negative rights (positive freedom).¹²¹ In fact, the adoption of the ICESCR along with the ICCPR as well as the rapid expansion of the development discourse in international legal debate clearly manifests the triumph of social-welfare liberalism, or “liberal” liberalism,¹²² over classical liberalism, or *laissez-faire* liberalism, in international law. This implies that democracy stands for normative goals ‘that include social justice, development of individuality, and solving of public problems’.¹²³

Second, constitutionalism from the perspective of the global constitutionalism thesis does not refer merely to having a constitution, but to having a particular kind of constitution, that is legitimate constitution¹²⁴ — a constitution embodying the principles of constitutionalism. On this account, constitutionalism is a political theory that captures more than the existence of, and adherence to, the written text; rather it is an understanding of the law ‘as a bulwark against the arbitrary exercise of power’.¹²⁵ Thus, while traditional theory of constitutionalism is rather descriptive in that it depicts any structure of government as constitutional as long as it originates and maintains its power in accordance with constitution, ‘new constitutionalism’, which underpins the doctrine of global constitutionalism, presupposes the existence of certain procedural and substantive characteristics which are, in turn, ‘an articulation of a “higher law” of the community of nations, reflecting a global communal consensus evidenced in common practice or international agreements’.¹²⁶ Indeed, more and more scholars subscribe to this new value-loaded understanding of constitutionalism. For Cottier, ‘legitimate’ constitution has to

¹²¹ See Isaiah Berlin, *Four Essays on Liberty* (OUP 1969) 122.

¹²² Michael W Doyle, ‘Kant, Liberal Legacies and Foreign Affairs’ (1983) 12 *Phil & Pub Aff* 205, 207. For a good summary of the core precepts of new liberalism, see Conrad Waligorski, *Liberal Economics and Democracy: Keynes, Galbraith, Thurow, and Reich* (UP of Kansas 1997) 11-17 (These are: (1) critique of *laissez-faire* economics; (2) ‘positive’ conception of freedom; (3) equality; (4) democracy; (5) individualism; (6) power; (7) equilibrium between public and private; (8) positive role of government).

¹²³ Conrad Waligorski, *Liberal Economics and Democracy: Keynes, Galbraith, Thurow, and Reich* (UP of Kansas 1997) 26.

¹²⁴ Anne Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’ (2006) 19 *LJIL* 579, 582.

¹²⁵ Anthony F Lang and Antje Wiener, ‘A Constitutionalising Global Order: An Introduction’ in Anthony F Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar Publishing 2017) 4.

¹²⁶ Larry Cata Backer, ‘Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering’ (2009) 16 *J Global Legal Stud* 85, 89. See also Thomas Cottier and Maya Hertig, ‘The Prospects of 21st Century Constitutionalism’ (2003) 7 *Max Planck YB UN L* (2003) 261, 278. But see typologies of constitutions discussed by Grimm who maintains that all modern constitutions are prescriptive unlike pre-modern constitutions (non-legal) that are descriptive. Dieter Grimm, ‘Types of Constitutions’ in Michel Rosenfeld and Andras Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2013) 106.

meet certain prerequisites, such as ‘setting up and limiting the power of the polity, defining the fundamental boundaries between the private and the public, the state and the individual and between the different branches of government’.¹²⁷ Further, d’Aspremont’s emphasis on the legitimacy of exercise in contrast to the legitimacy of origin¹²⁸ reflects, albeit implicitly, a need for a revision of the doctrine of constitutionalism from its classical variant as an irreversible one-time event where the legitimate establishment of constitution is not questioned to a new model subject to continuous evaluation of legitimacy of constitutional process by reference to constitutional values, such as the division of powers, checks and balances, the rule of law and human rights.

That said, ‘liberal’ liberalism and new constitutionalism animate the new definition of democracy. On this view, democracy is a system of government established through the process of periodic, free, fair and genuine elections based on universal suffrage in multiparty setting guaranteeing continuous political participation (by means of vote and other democratic institutions, such as referendums and civil society organisations) on conditions of equality and non-discrimination as well as protection of a certain core of socio-economic rights and operating on the basis of a legitimate constitution founded on the principles of checks and balances, divisions of power and the rule of law.¹²⁹ Thus, rather than being purely confined to the procedural notions of the rights to vote and stand for elections, democracy is ‘a series of rights that are collectively reinforcing’.¹³⁰ On this (substantive) account, democracy is more than a means to reach power. It is an end in itself because it ensures the realisation of the fundamental capabilities of all members of society.¹³¹ Simply put, democracy is a political regime that takes human rights seriously and tackles diversity by means of debate. Accordingly, democracy should be understood as a comprehensive legal model stretching beyond the minimalist aspects and encompassing a series of fundamental rights and freedoms that are reciprocally reinforcing.¹³² Such essential procedural pillars as the right to vote and the right to be elected in free and fair elections can only be fully guaranteed if accompanied by, among others, the right to education, since the voter’s knowledge of the structure of the state and how the political power is administered and distributed enhances his right to vote; the right to access media, providing voters with essential information platform on the basis of

¹²⁷ Thomas Cottier and Maya Hertig, ‘The Prospects of 21st Century Constitutionalism’ (2003) 7 Max Planck YB UN L (2003) 261, 278.

¹²⁸ See generally Jean d’Aspremont, ‘Legitimacy of Governments in the Age of Democracy’ (2006) 38 NYUJ Int’l L & Pol 877.

¹²⁹ Importantly, the capitalist model of economics, assuming opening up of restrictions on trade and the protection of property rights, is another crucial underpinning of liberal democracy. However, economic and political strands of liberalism are treated separately in this thesis, only the latter being relevant for this research.

¹³⁰ Gregory H Fox, ‘Democracy, Right to, International Protection’ in Rudiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2013) para 10.

¹³¹ See Crawford B Macpherson, *The Real World of Democracy* (Clarendon Press 1966) 37.

¹³² Khalifa A Alfadhel, *The Right to Democracy in International Law* (Routledge 2017) 50.

which they could make their political choices; the right to fair trial and judicial remedy to ensure integrity and impartiality of the election administration and impede the violations of the right to vote and other rights.

Importantly, the UN Commission on Human Rights in its resolution ‘Promotion of the Right to Democracy’ came closest to the delineation of the right to democracy as an embodiment and mutual reinforcement of certain fundamental rights and freedoms, including the rights of opinion, thought, religion and peaceful assembly; the right to information; the rule of law and impartial and independent judiciary; the right to vote and stand for elections; transparent and accountable government institutions etc.¹³³ Drawing on this resolution, one can distinguish five components of democracy: electoral, liberal-constitutional, participatory, deliberative and egalitarian.¹³⁴ The electoral component of democracy entails the identification of collective will by means of electoral process. The liberal-constitutional component embodies the protection of individual rights against a potential ‘tyranny of majority’ by the constitutional entrenchment and the constitutional protection of the rule of law, checks and balances and judicial independence from the executive. The participatory component envisages active participation of citizens in political decision making by means of vote as well as non-electoral engagement in political processes through civil society organisations and mechanisms of direct democracy. The deliberative component presupposes the overriding importance of dialogue and deliberation in formation of political decisions over subjective appeals to solidarity, national sensibility and resort to coercion. Lastly, the egalitarian component entails the equal importance of socio-economic rights (with respect to civil and political rights) in attainment of political equality.¹³⁵

This refined substantive definition is not a panacea and does not solve all theoretical and practical problems that animate the concept of democracy. However, it overcomes certain major criticisms within debates on theories and models of democracy. Thus, the new definition of democracy does not confine democracy to a mere process of electoral competition, neither does it fail to set conceptual limits on the notion of democracy to keep it operational. Unlike the original substantive conception of ‘everything goes’, the limited substantive conception of democracy is not concerned with abstract notions of social justice and human dignity. Rather, it provides for a normative evaluative framework bolstering the capacity of the existing network of human rights to serve their original goals, including liberty, equality and self-empowerment, by means of popular control over collective decision-making as a mutually reinforcing system. Moreover, the extent of protection of human rights and liberties as an evaluative criterion of democratic government is not taken in

¹³³ UNCHR, ‘Promotion of the Right to Democracy’ (27 April 1999) UN Doc E/CN.4/RES/1999/57, para 2.

¹³⁴ Staffan I Lindberg and others, ‘V-Dem: A New Way to Measure Democracy’ (2014) 25 *Journal of Democracy* 159, 160-61.

¹³⁵ *ibid.*

abstract, meaning that every human right should be perfectly guaranteed for an entity to qualify as democratic. Rather, human rights and freedoms, including socio-economic rights, should be respected at least to the extent they ensure minimum space for genuine and continuous participation, equality (both during and between elections) and diversity. Such an approach solves the problem of both competitive authoritarianism and illiberal constitutionalism as the two concepts by virtue of effectively defeating the *de facto* impact of citizens' choices on the political and institutional layout of their governments would not fall under the definition of democracy.

On the other hand, for democracy to maintain its universal appeal, certain local democratic variations should be accepted. However, to ensure that these variations do not serve as a cover for soft forms of authoritarianism, the minimum liberal core of the concept of democracy, namely meaningful participation and effective contestation of the majoritarian politics, is to be preserved to the extent that the five aforementioned elements of democracy are effectively realised. This is based on a suggestion that the liberal aspect of liberal democracy is not to be sacrificed for the sake of the democratic aspect, albeit it may be adjusted to ensure broader participation. In this sense, liberty is a key democratic value, whereas broad political participation is a means to ensure liberty. Whenever the liberty of thought and conscience, autonomy and the right to political opposition are compromised in the name of majoritarian objectives, this is not democracy, however massively supported such objectives might be. Such conceptualisation may seem to be lacking analytical precision and even imperialistic, since the principles animating the above-suggested definition of democracy are liberal principles originating in the seventeenth-century Europe and, thus, anything but universal. However, the particular historical and geographical pedigree of an idea does not *per se* preclude its universalist claims. To assert otherwise is to endorse the crude relativist view that a state's political system is a matter of its own business and beyond criticisms. As the world goes increasingly interdependent, state's internal affairs are a subject of general concern. This requires an adoption of a minimum code of moral and political principles of good governance, which are both universally valid and culturally sensitive. World governments are free to evolve their national politics in line with their cultural particularities but in a way compatible with these regulative principles.¹³⁶ Whilst it goes beyond the scope of this argument to prove the cross-cultural consensus over these principles, it suffices to mention the 1948 Universal Declaration of Human Rights (UDHR) laying down the general principles every government should satisfy. Because the declaration translates these principles into the language of rights and recognises that the will of the people constitutes the basis of the authority of government, it implies liberal democracy. Since the declaration was signed by a large number of governments representing different cultures, geographical areas and political systems, it commands considerable universal

¹³⁶ See eg Bhikhu Parekh, 'The Cultural Particularity of Liberal Democracy' (1992) 40 Pol Stud, issue s1 August 1992, 160, 173.

support. Thus, the principles of liberal democracy, on which the UDHR is founded, are increasingly becoming 'a common standard of achievement for all peoples and nations'.¹³⁷

Ultimately, the lack of deeper analytical precision of the present conceptualisation stems from the very essence of the liberal rationale, namely defence of values solely essential for maintaining individual liberty, short of imposing an overarching normative world vision. This suggests that governments are allowed a certain margin of discretion when it comes to combining democracy and liberalism depending on their history, traditions, values and needs. Some may opt for their equal relationship whereby each limits the excesses of the other. Other may decide to assign greater role to the democratic element by providing a greater network of channels for popular participation, whereas the liberal component ensures the protection of minority interests. The most obvious example is the Nordic model of social democracy, where the primacy is assigned not to liberal values, as the classic model of liberal democracy entails, but to democratic controls over injustices in society.¹³⁸ Or the political system can be tailored in a manner to ensure a more balanced relationship between the individual and the community by providing for a fairer distribution of opportunities through the engagement in, *inter alia*, major economic reforms. This model has been dubbed by Parekh as 'democratically liberal' rather than a liberal democracy.¹³⁹ Ultimately, the liberal element may be the dominant partner by ensuring that the democratic process does not undermine individual autonomy and control over decision-making process. To this end, Richard Youngs advocates a guiding principle of 'liberalism plus' which suggests that 'democratic variation should be pursued through innovations that add to the core template of liberal democracy rather than subtract from it'. It means giving 'greater meaning to political liberalism's core spirit of tolerance, pluralism, and popular accountability over the powerful'.¹⁴⁰ In other words, one should return to the original procedural understanding of liberalism which emerged as a philosophy of toleration instead of fallaciously associating it with amorality, excessive individualism, attack on conservative tradition and community and intolerance for religion.¹⁴¹

¹³⁷ Universal Declaration of Human Rights, UNGA Res 217(III)A (10 December 1948) preamble.

¹³⁸ See Milja Kurki, *Democratic Futures: Revisioning Democracy Promotion* (Routledge 2013) 67-74.

¹³⁹ Bhikhu Parekh, 'The Cultural Particularity of Liberal Democracy' (1992) 40 *Pol Stud*, issue s1 August 1992, 160, 169.

¹⁴⁰ Richard Youngs, *The Puzzle of Non-Western Democracy* (Carnegie Endowment for International Peace 2015) 6.

¹⁴¹ *ibid* 111.

3.5. Conclusion

It is established that the definition of democracy is a critical issue to be addressed if one is to speak of democracy as a human right. Political science is demonstrated to lack a coherent definition of democracy. Within its broad discourse on the notion of democracy, one can distinguish three broad theories: classical, procedural and substantive, none of which stands scrutiny on its own. Whereas the classical theory of democracy is too broad, according to which democratic government is the one formed by the will of the people expressed through political participation and serves the people by means of promoting development and material goods, the procedural conception is too narrow and equates democracy to electoral method. Neither provides for the adequate account of democracy, because whilst the former conception does not indicate clear guidelines as to how to distinguish democratic regimes from non-democratic ones, the latter claims that any regime originating in elections is democratic. The substantive conception was invented to tackle the problem of excessive reliance on elections in qualifying the political character of the regime by appealing to democracy's underlying principles, such as equality and self-empowerment. Yet, because it does not set precise conceptual limits to the application of these principles, it has been widely disqualified as fuzzy and unworkable.

The conceptual indeterminacy of the notion of democracy in political science is exacerbated by the fact that there are two competing models of democracy: revolutionary, characterised by broad public sphere and absence of genuine choice in political processes, and liberal, marked by the centrality of individual liberty in the political space, the presence of internal and external checks on political power and the system of free, fair and regular elections. The complexity lies in the fact that both models are commonly viewed as democratic but in different ways, and the both could undermine the practice of democracy if carried to extremes: the threat of excessive communitarianism in the case of revolutionary democracy and excessive individualism in the case of the liberal model. Even though it is established that liberal democracy is now widely recognised as the only model compatible with international human rights law, ambiguity as to the precise conceptual frames of its underlying components, such as liberal, constitutional and democratic, persists until today.

The treatment of democracy in international law largely mirrors the uncertainties and challenges faced by political scientists, albeit the procedural liberal conception seems to considerably dominate international legal debate, largely due to its measurability. It revolves around the question of elections and their compatibility with international human rights law. Even though such procedural approach to the definition of democracy is criticised on many fronts, particularly because it conceals and neglects the normative essence of democracy as a framework of empowerment and equality and thereby renders democracy toothless against manipulation by antidemocratic actors, viewing democracy through the prism of elections seems safer and more practical than

delving into complex discussions of democracy's normative elements, such as respect for human rights and the rule of law, whose empirical ascertainment and measurement are close to impossible. It is claimed that because the conventional election-centred conception of democracy is at loggerheads with the international law's changing attitude toward the character of government regime and the role of individual in national and international systems and because the substantive definition is too generic to lay down precise limits for the concept of democracy, a novel approach is needed.

The thesis consequently suggests a so-called 'limited' substantive conception of democracy based on modern interpretations of the doctrines of constitutionalism and liberalism. Against this backdrop, democracy is defined as a system of government established through the process of periodic, free, fair and genuine elections based on universal suffrage in multiparty setting guaranteeing continuous political participation (by means of vote and other democratic institutions, such as referendums and civil society organisations) on conditions of equality and non-discrimination as well as protection of a certain core of socio-economic rights and operating on the basis of a legitimate constitution founded on the principles of checks and balances, divisions of power and the rule of law. Democracy is, thus, viewed as a comprehensive legal model originating in elections but stretching beyond the electoral method and encompassing a series of fundamental rights and freedoms that are mutually reinforcing. It is based on five pillars: electoral, liberal-constitutional, participatory, deliberative and egalitarian. It is accepted that even though the novel conceptualisation of democracy does not solve all the challenges animating the debate on the legal definition of democracy, it tackles major weaknesses of the earlier conceptions and is flexible enough to accommodate local variations, what makes it universally applicable.

4. The Right to Democracy in the Constitutionalising International Law

As has been previously illustrated, there is a variety of ways to inscribe the right to democracy into the existing fabric of international law. The adherents of the democratic entitlement school attempt to tie democracy to one or several internationally recognised human rights but are cautious to declare the legally enforceable right to democratic government on its own terms. This cautiousness is clearly visible in the way they apply the qualifier ‘emerging’ to the right to democracy. Thus, while they all share an opinion that something like an ‘emerging democratic entitlement’ has undoubtedly enriched the modern lexicon of international law, how far this notion stretches and what concrete obligations it imposes on states is still marked by obscurity. Somewhat more scepticism towards democracy, either as a right or obligation, is traceable in the works of scholars claiming that states are customarily obliged to solely ensure free and fair electoral process. Moreover, the scope of application of this customary norm is arguably weakened by numerous persistent objectors to it.¹ On an even more sceptical note, democracy is reduced to a teleological principle, according to which states are obliged to merely develop towards democracy and counter democratic regressions. The least optimistic view denies any legal standing to democracy by arguing that the concept is too political to be transposed to the realm of law. The rationale behind such a wariness to recognise a fully-fledged human right to democracy bestowed with every individual lies in the lack of evidence of state consent traditionally expressed by means of treaties and custom. Be that as it may, the twenty-first-century international law exhibits strong empirical evidence of its constitutionalisation by recognising sources of legitimacy going beyond isolated instances of expression of state will. This ‘non-consensual’ sources of legitimacy are couched in language of global values shaped by international consensus, which is, in turn, reflected in, *inter alia*, pronouncements of international organisations and general principles. This chapter examines legal foundations of the right to democracy in light of the recent developments in international law within such foundational domains as treaty interpretation (section 4.1), customary international law (section 4.2), the soft law thesis (section 4.3) and general principles of law (section 4.4).

¹ China and several states in the Middle East can probably be considered persistent objectors to that rule. Jean d’Aspremont, ‘The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks’ (2011) 22 EJIL 549, 557.

4.1. From Textual to Teleological and Evolutive Interpretations

4.1.1. Textual Interpretation of Democratic Provisions in International Legal Instruments: *Tour d'Horizon*

The substantive elements of the democratic entitlement are firmly enshrined in the body of public international law in general and international human rights law in particular. The Charter of the United Nations — often referred to as the constitution of the international society² — does not explicitly mention democracy. However, many legal commentators suggest that with the opening words of the Charter, ‘We the peoples of the United Nations’, the drafters envisaged the fundamental principle of democracy by deriving the legitimacy of the organisation from the will of the peoples represented through their respective governments.³ Moreover, by committing itself to the reaffirmation of ‘faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small’ and to ‘the promotion of the economic and social advancement of all peoples’,⁴ the Charter reflects such fundamental democratic principles as equality and self-determination. These twin democratic principles also animate articles 55 and 56 of the Charter, which recognise the importance of political and socio-economic rights for the realisation of these principles. Other scholars are rather cautious to adopt such an inclusive interpretation of the text of the Charter. They claim that the period when the Charter was adopted was marked by the existence of a variety of political regimes ranging from liberal democracies to outright autocracies. The idea of universality that transgresses the text of the Charter and particularly its article 2(7) (the principle of non-intervention) placed the question of domestic political regime outside the purview of the international society. For them, either ‘people’ is synonymous with ‘states’ or the term may have merely been used to designate the fact that not all states

² See eg Blaine Sloane, ‘The United Nations Charter as a Constitution’ (1989) 1 Pace YBIL 61; Marie Dupuy, ‘The Constitutional Dimension of the United Nations Revisited’ (1997) 1 Max Planck YB UN L 1; Ronald MacDonald, ‘The Charter of the United Nations in Constitutional Perspective’ (1999) 20 Austr YBIL 205.

³ Boutros Boutros-Ghali, *An Agenda for Democratization* (United Nations 1996) 12; UNGA ‘Supplement to Reports on Democratization’ (1996) UN Doc A/51/761, para 1 (The UN Secretary-General maintained that the Charter ‘offers a vision of democratic states and democracy among them’). Similarly, the UNGA has repeatedly affirmed that democracy is one of the principles enshrined in the Charter. See eg UNGA Res 50/133 (16 February 1996) UN Doc A/RES/50/133, preamble.

⁴ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, preamble.

were sovereign when the Charter was drafted or it may simply be dismissed as rhetoric.⁵

The excessive brevity of the Charter human rights provisions has been remedied by the Universal Declaration of Human Rights (UDHR), the 1966 covenants on human rights and other UN instruments and resolutions. The UDHR recognises rights to freedom of political opinion and expression, peaceful assembly and association and, most importantly, the right to political participation, including the right to ‘periodic and genuine elections which shall be by universal suffrage and shall be held by secret vote or by equivalent free voting procedures’.⁶ Article 2 of the Declaration subjects all other articles to a general prohibition of discrimination on such grounds as ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status’. Applied to article 21 (providing for the right to political participation), no one can be discriminated on the basis of political or other opinion when exercising his or her right to political participation. Last but not least, article 28 provides that ‘[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized’.⁷ Taken together, articles 2, 21 and 28 lay a legal foundation for the right to democracy in international law. Albeit it is logical to assume that the Declaration’s definition of democracy excludes non-pluralist governments (particularly by virtue of the article 2 prohibition of discrimination on basis of, among others, political opinion), the understanding of democracy is still by and large election-centred. Another concern is the UDHR’s non-treaty status. Although it is, at an increasing rate, asserted that the provisions of the Declaration have come to reflect customary international law as well as general principles of law recognised by civilised nations⁸ and can even be viewed as a specification and authoritative interpretation of the human rights provisions of the UN Charter, the language of the UDHR is too general and vague to derive concrete state obligations therefrom.

Democratic provisions of the Declaration had eventually acquired treaty form by their inclusion into the International Covenant on Civil and Political

⁵ See Steven Wheatly, ‘Democracy in International Law: A European Perspective’ (2002) 51 ICLQ 225, 228; Jean-Pierre Cot, Alain Pellet and Mathias Forteau, *La Charte des Nations Unies: Commentaire Article par Article* (3rd edn, Economica 2005) 308; Christian Tomuschat, ‘Democracy and the Rule of Law’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 483.

⁶ Universal Declaration of Human Rights, UNGA Res 217(III)A (10 December 1948) arts 19-21.

⁷ *ibid* art 28.

⁸ See eg Louis B Sohn, ‘The Human Rights Law of the Charter’ (1977) 12 Tex Int’l LJ 129, 133; Philip Alston, ‘The Universal Declaration at 35: Western and Passé or Alive and Universal’ (1982) 31 ICJ Rev 60, 69; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1989) 82; Lung-Chu Chen, ‘Restatement: Protection of Persons’ (1989) 14 Yale JIL (1989) 542, 546-47; Louis Henkin, *The Age of Rights* (Columbia UP 1990) 19; Richard B Lillich, ‘The Growing Importance of Customary International Human Rights Law’ (1995-96) 25 Ga J Int’l & Comp L 1, 1; Hurst Hanum, ‘The Status of the Universal Declaration of Human Rights in National and International Law’ (1996) 25 Ga J Int’l & Comp L 287.

Rights (ICCPR), which refers to ‘democratic society’ as a default political system of state parties.⁹ Together with the rights to freedom of expression, peaceful assembly and association,¹⁰ the ICCPR provides for a right of peoples to political self-determination.¹¹ Similarly to the UDHR, the ICCPR avoids the word ‘democracy’, but is rather confined in terms of the right to political participation and political accountability through elections. Article 25 of the Covenant, which is now commonly accepted as a repository for democratic entitlement, states as follows:

Every citizen shall have right [...] (a) to take part in the conduct of public affairs, directly or through freely chosen representatives [and] (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) to have access, on general terms of equality, to public service in his country.¹²

Since the article does not explicitly refer to democracy, many international legal scholars claim that it does not impose an obligation to institute and uphold the democratic form of government, let alone envisages sanctions for the failure to tackle antidemocratic trends. Moreover, given the ostensible brevity of wording of the article, a lack of consensus persists regarding its substantive specifications, such as, for instance, the imminence of political pluralism in the definition of democracy. In more concrete terms, the ambiguity as to whether article 25 enshrines an obligation to install multiparty democracy is caused by two competing interpretations of democracy existing at the time of drafting of the Covenant. Western vision of democracy implied ‘liberal democracy’, which is only possible in multiparty setting, whilst the Eastern bloc, on the other hand, embraced the model of ‘people’s democracy’. Thus, the adoption of the ICCPR was conditioned by its responsiveness to the interests and concerns of both bipolar powers at that time, who were eager to make sure that their own system of politics was not in instant violation of the article.¹³ It stands, thus, to a reason that during the Cold War, one-party democracy was acceptable under the Covenant to the extent that the dominant party allowed for the realisation of multifarious political agendas. Because the latter is easy to fulfil, many modern authoritarian regimes that are based on the one-party system of government claim that they live up to their obligations under the Covenant. Such elasticity ascribed to the concept of democracy ‘robb[s] it of all normative value in international law’: in the end of the day democracy that means everything in fact means nothing.¹⁴ It is also against the backdrop

⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts 14(1), 21 and 22(2).

¹⁰ *ibid* arts 19, 21 and 22 respectively.

¹¹ *ibid* art 1(1).

¹² *ibid* art 25.

¹³ Henry Steiner, ‘Political Participation as a Human Right’ (1988) 1 Harv Hum Rts YB 77, 93.

¹⁴ Susan Marks, ‘International Law, Democracy and the End of History’ in Gregory Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 532.

of this political compromise that the mainstream scholarship insists that neither the UDHR nor the ICCPR guarantees the right to democracy since the obligation to ensure the right to political participation and the right to vote in free and fair elections is not fully concomitant with the obligation to introduce a democratic form of governance. This position is also implied in the *Nicaragua* case, in which the ICJ declared that ‘the Court cannot find an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua [a party to the ICCPR] has committed itself in respect of the principle or methods of holding elections’.¹⁵

However, it is logical to suggest that the very notion of *free* and *fair* elections implies a multi-party system, since only when the voter is offered a number of alternatives, can his voting be considered as free. This idea is seemingly supported by the Human Rights Committee (HRC), which considered in its case law that ‘restrictions on political activity outside the only recognized political party amount to an unreasonable restriction of the right to participate in the conduct of public affairs’.¹⁶ Later on it issued its General Comment on article 25 where it held that ‘[a]rticle 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant’.¹⁷ The Committee further argued that ‘[b]y virtue of the rights covered by article 1(1), peoples have the right to freely determine their political status and to enjoy the right to chose the form of their constitution or government’.¹⁸ Article 25 appears to be a logical addendum to article 1 as it specifies the means for the exercise of the right of self-determination. Moreover, the Committee established that the right to political participation depends on some other rights: ‘Freedom of expression, assembly and association are essential conditions for the right to vote and must be fully protected’.¹⁹ The Committee, thus, affirmed that compliance with article 25 implies the democratic form of government. However, its pronouncements have been rapidly discounted by traditional scholarship as falling into the realm of ‘soft law’ and of no binding effect on states.

Legal provisions in support of democracy can also be found in other more subject-specific international human rights instruments, such as the International Convention on Elimination of All Forms of Racial Discrimination (ICERD),²⁰ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)²¹ and the Convention on the Rights

¹⁵ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 261.

¹⁶ *Bwalya v Zambia* (1988) 5 Selected Decisions of the Human Rights Committee 23, 25, para 6.6.

¹⁷ UNHRC ‘General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote)’ (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 1.

¹⁸ *ibid* para 2.

¹⁹ *ibid* para 12.

²⁰ International Convention on Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD).

²¹ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

of Persons with Disabilities (CRPD).²² Article 5 ICERD, which is of relevance to all kinds of minorities, provides:

State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to the race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...]

(c) Political rights, in particular the right to participate in elections — to vote and to stand for election — on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have access to public service [...].²³

Similarly, article 7 CEDAW states:

State Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies [...].²⁴

Last but not least, article 29 CRPD stipulates:

State Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to:

a. Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected [...].²⁵

Similar provisions are included in other important international documents, such as the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (article 2), the 1953 Convention on the Political Rights of Women (articles I-IV) and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (articles 41, 42). Whilst the importance of these instruments for the democratic entitlement is hard to overestimate, the understanding of democracy they advance is clearly procedural, since the introduction and maintenance of the institution of

²² Convention on the Rights of Persons with Disabilities, UNGA Res 61/106 (13 December 2006) (CRPD).

²³ International Convention on Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD) art 5.

²⁴ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 7.

²⁵ Convention on the Rights of Persons with Disabilities, UNGA Res 61/106 (13 December 2006) (CRPD) art 29.

elections is viewed as a sufficient evidence of compliance with the obligations laid down by the aforementioned provisions.

The most elaborate treatment of democracy can be found at regional levels. In Europe, the preamble of the Statute of the Council of Europe (CoE) reaffirms the devotion of the member states 'to the spiritual and moral values which are common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy'.²⁶ The European Convention on Human Rights (ECHR), adopted by the CoE, puts democracy at the core of its human rights regime. It recognises an inherently close relationship between democracy and the protection of human rights: '[F]undamental freedoms [...] are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend'.²⁷ The concept of a democratic society is a unifying thread throughout the Convention, and in cases when limitations of the rights enshrined in the Convention are allowable this may only be done when 'necessary in democratic society'.²⁸

Article 3 of Protocol 1 to the ECHR specifies the elements of effective democracy which include 'free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'.²⁹ While article 3 is substantially narrower in scope than article 25 ICCPR, the European Commission and Court of Human Rights (ECmHR and ECtHR) have interpreted this article to provide guarantees similar to those contained in the ICCPR. This has been done, by and large, through the backdoor of articles 10 and 11 of the Convention, protecting freedoms of expression and assembly respectively, as well as by interpreting provisions of the Protocol through the prism of the European common democratic heritage. For instance, in *Zdanoka v Latvia*, the Court declared that democracy constitutes a fundamental element of the 'European public order' and is the only political model compatible with the Convention.³⁰ More than that, the ECtHR in its case law developed an understanding of democracy going beyond electoral minimum espoused by the international human rights instruments by referring to such essential elements of democracy

²⁶ Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949) ETS No 001, preamble.

²⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 005 (ECHR) preamble.

²⁸ *ibid* second paragraph of arts 8-11.

²⁹ Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1952, entered into force 18 May 1954) ETS 9 (ECHR-P1) Article 3.

³⁰ *Case of Zdanoka v Latvia* App no 58278/00 (ECtHR (GC) 16 March 2006) para 98. See also *United Communist Party of Turkey and Others v Turkey* App no 19392/92 (ECtHR, 30 January 1998) para 45 ('[D]emocracy is without doubt a fundamental feature of the European public order').

as pluralism,³¹ tolerance and broadmindedness.³² To this end, the Court frequently invoked arguments from democratic political theory and resorted to political analysis in its judgments.³³ As Vidmar noted, whilst at the international level the question of multipartyism as an inalienable element of democracy is still unsettled, the jurisprudence of the ECtHR speaks for the multiparty democracy as the only form of governance compatible with the Convention.³⁴

In the Americas, a commitment to promote democracy is provided in the 1948 Charter of the Organisation of American States (OAS), which encourages its members to ‘promote and consolidate representative democracy’, albeit ‘with due respect for the principle of non-intervention’.³⁵ It further expresses the conviction that ‘representative democracy is an indispensable condition for the stability, peace and development of the region’.³⁶ Furthermore, the 1992 Protocol of Washington, which amended the OAS Charter by laying out clear and specific procedures for collective response to democratic overthrows,³⁷ ‘finally transformed into reality what had been merely proclaimed in the 1948 Charter, since it turned democracy into an obligation, and into a condition for continued membership in the Organization’.³⁸

The obscure terms of the OAS Charter have found precision in the American Convention on Human Rights (ACHR), which recognises democratic rights to freedom of expression, assembly and association and the right of every citizen ‘(a) to take part in the conduct of public affairs, directly or through freely chosen representatives; [and] (b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and

³¹ *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) para 49 (‘Freedom of expression [...] is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population’); *Case of Socialist Party and Others v Turkey* App no 20/1997/804/1007 (ECtHR, 25 May 1998) para 41 (‘There can be no democracy without pluralism’).

³² See *Case of Lustig-Prean and Beckett v The United Kingdom* Apps no 31417/96 and 32377/96 (ECtHR, 27 December 1999) para 80 (The Court held that the hallmarks of a ‘democratic society’ constitute pluralism, tolerance and broadmindedness).

³³ See *Rekvenyi v Hungary* App no 25390/94 (ECtHR, 20 May 1999); *Case of Refah Partisi (The Welfare Party) and Others v Turkey* Apps no 41340/98, 41342/98, 41343/98 and 41344/98 (ECtHR (GC) 13 February 2003); *Case of Zdanoka v Latvia* App no 58278/00 (ECtHR (GC) 16 March 2006). See also Jure Vidmar, ‘Multiparty Democracy: International and European Human Rights Law Perspectives’ (2010) 23 LJIL 209, 239.

³⁴ Jure Vidmar, ‘Multiparty Democracy: International and European Human Rights Law Perspectives’ (2010) 23 LJIL 209, 240.

³⁵ Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3 (OAS Charter) art 2(b).

³⁶ *ibid* preamble.

³⁷ OAS, Protocol of Amendments to the Charter of the Organization of American States (A-56) ‘Protocol of Washington’ (adopted 14 December 1992, entered into force 25 September 1997) OAS Treaty Series No A-56, art 9.

³⁸ Jean-Paul Hubert, ‘Follow-Up on the Application of the Inter-American Democratic Charter’ (OAS/Ser. Q, CJI/doc.317/09 corr.1, Bogota, 19 March 2009) 9.

by secret ballot that guarantees the free expression of the will of the voters'.³⁹ Moreover, the role of the Inter-American Commission and the Court (IACmHR and IACtHR) in giving precision and putting into context various democratic provisions of the Convention is hard to overestimate.⁴⁰ To illustrate, in the framework of article 27 ACHR, concerning the legality of derogation measures adopted during states of emergency, the IACmHR assumed the task of controlling the legality of the government itself which introduces the derogation measures. For instance, in Nicaragua, when the Somoza government was overthrown, the IACmHR referred the situation to the Meeting of Consultation of Ministers of Foreign Affairs, which in turn questioned the legality of the government that had effected gross human rights violations and called for its immediate replacement by a democratic regime.⁴¹ Further, in the cases of *Velasquez Rodriguez* and *Godínez Cruz*, the IACtHR emphasised the State's duty to be functionally organised in such a way as to permit the realisation of human rights.⁴²

The turning point occurred with the adoption of the Inter-American Democratic Charter (IADC)⁴³ on 11 September 2001. Irrespective of its status as an OAS General Assembly resolution, it can nevertheless be put on a par with a binding treaty by virtue of being an authoritative interpretation of the OAS Charter.⁴⁴ Its article 1 unprecedentedly proclaims: 'The peoples of the Americas have a right to democracy and their governments have an obligation

³⁹ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) arts 13, 15, 16 and 23(1) respectively.

⁴⁰ See *The Word 'Laws' in Article 30 of the American Convention on Human Rights* (IACtHR, Advisory Opinion OC-6/86, 9 May 1986) Series A 6, para 34 ('The meaning of the word "laws" in Article 30 cannot be disassociated from the intention of all the American States, as expressed in the Preamble to the Convention, "to consolidate in the hemisphere within the framework of democratic institutions a system of personal liberty and social justice based on respect for the essential rights of man"'); *Yatama v Nicaragua* (IACtHR, 23 June 2005) Series C 127, para 192 (The Court, citing para 34 of *The Word 'Laws'* Advisory Opinion, declared that '[r]epresentative democracy is the determining factor throughout the system of which the Convention is a part', and 'a "principle" reaffirmed by the American States in the OAS Charter, the basic instrument of the inter-American system.' The political rights protected in the American Convention, as well as in many international instruments, promote, as the Court proceeds, the strengthening of democracy and political pluralism); *Claude-Reyes et al v Chile* (IACtHR, 19 September 2006) Series C 151, para 84 (reiterated *verbatim* para 192 of the *Yatama* case); *Kimel v Argentina* (IACtHR, 2 May 2008) Series C 177, para 87 (Affirming that tolerance and transparency are 'the requirements of the pluralism inherent in a democratic society, which requires the greatest flow of information and opinions on issues of public interests').

⁴¹ 17th Meeting of Consultation of Ministers of Foreign Affairs (23 June 1979) Res/2, Ser/FII.17, Doc.40/79 rev. 2.

⁴² *Velasquez Rodriguez Case* (IACtHR, 29 July 1988) Series C 4; *Godínez Cruz Case* (IACtHR, 20 January 1989) Series C 5.

⁴³ OAS, Inter-American Democratic Charter, OEA/Ser.G/CP-1 (11 September 2001).

⁴⁴ The Inter-American Juridical Committee posited in its special report of August 2001 that '[t]he provisions of resolutions of this nature generally have as their purpose the interpretation of treaty provisions; the provision of evidence of existence of customary norms [...] The provision of some resolutions of an organ of an international organization may have an obligatory effect'. CJI/Res. 32 (LIX O/01) (24 August 2001) para 5. See also section 5.3 of this thesis.

to promote and defend it'. Crucially, the substantive purview of democracy exceeds the mere electoral straitjacket; the Charter sets benchmarks for representative democracy, which include

[R]espect for human rights and fundamental freedoms, access to and exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.⁴⁵

The affirmation that democracy is now a human right was repeated in various subsequent declarations. For example, the 2003 Declaration on Security in the Americas declared: 'We reaffirm that democracy is a right [...]'.⁴⁶ Similarly, in 2005, member states referred to article 1 IADC as explicitly establishing the right to democracy of American peoples and the respective duty of governments to protect it.⁴⁷ Such unqualified language of democracy as both a right and duty was initially met by many with resistance. However, 'when the dust has settled, it was found that [...] Article 1 lifts the concept to a significantly advanced reciprocal contract of peoples with governments'.⁴⁸ On top of that, democratic provisions of the Charter can now be regarded as customary law since '[w]hether an instrument that is a political declaration becomes part of the fabric of customary international law is a function of precedent. In the case of the Charter, as was the case with Resolution 1080, precedents are already providing validation'.⁴⁹ This view is shared by many American scholars who claim that there is now a 'right to democracy' in American regional law.⁵⁰

At the African level, the African Charter on Human and Peoples' Rights (ACHPR or 'Banjul Charter') does not explicitly mention a right to elections. It does, however, guarantee the rights to freedom of expression, association and assembly, and the right of political participation 'in the government of his country, either directly or through freely chosen representatives'.⁵¹ The absence of express democratic provisions in the Charter has been countered by the practice of the African Commission on Human Rights⁵² as well as by the

⁴⁵ OAS, Inter-American Democratic Charter, OEA/Ser.G/CP-1 (11 September 2001) art 3.

⁴⁶ OAS, Declaration on Security in Americas, Mexico City (28 October 2003) CES/DEC.1/03 rev. 1, para 5.

⁴⁷ OAS, Declaration of Florida: Delivering the Benefits of Democracy (7 June 2005) AG/Dec.41 (XXXV-O/05).

⁴⁸ John Graham, *A Magna Carta for the Americas: The Inter-American Democratic Charter: Genesis, Challenges and Canadian Connections* (Focal 2002) 7.

⁴⁹ *ibid.*

⁵⁰ See eg Heraldo Munoz, 'The Right to Democracy in the Americas' (1998) 40 J Interam Stud & Wld Aff 1, 2.

⁵¹ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (ACHPR) arts 9, 10, 11 and 13(1) respectively.

⁵² See eg *Interights et al v Islamic Republic of Mauritania* (2004) AHRLR 87 (ACHPR 2004) para 80; *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007) para 106; *Zimbabwe Lawyers*

adoption of the subsequent instruments containing more explicit democratic language, namely the 2000 Constitutive Act of the African Union⁵³ and 2007 Charter on Democracy, Elections and Good Governance.⁵⁴

The African Charter on Democracy, Elections and Governance defines one of its objectives ‘adherence, by each State Party, to the universal values and principles of democracy and respect for human rights’.⁵⁵ According to article 3, this Charter should be implemented in accordance with the following principles: respect for human rights and democratic principles; promotion of a representative system of government; and condemnation and total rejection of unconstitutional changes of government. Article 4 of the Charter provides that ‘States Parties should commit themselves to promote democracy, the principle of the rule of law and human rights [...] [and] recognize popular participation through universal suffrage as the inalienable right of the people’.⁵⁶

At first blush, one may get an impression that the right to democracy is firmly embedded in the existing treaty law. As d’Aspremont explains, even though ‘[c]es instruments n’évoquent toutefois jamais expressément l’établissement d’un régime démocratique [...] [n]ul ne peut cependant sérieusement contester que le droit à des élections libres, honnêtes et périodiques se confond avec une obligation d’établir un régime démocratique qui ne dit pas son nom’.⁵⁷ Indeed, if one subscribes to the institutional (procedural) vision of democracy then it is undeniably true that democracy, or more precisely the right to choose one’s leader in a free and fair electoral process, constitutes a binding (conventional) norm of international law. However, a more substantive understanding of democracy, that is a guarantee of genuine conditions for realisation of political equality and self-government, albeit partially featuring in European and American experiences, is hardly discernible at the international level, not to mention the Asian region where democratic commitments largely remain on the level of rhetoric. Moreover, certain conceptual modalities of democracy, that is, for instance, whether it encompasses political pluralism or can also describe one-party regimes, remain unresolved on the international plane. The question hence arises as to whether one shall assume a restrictive stance and interpret treaties in a stringent

for Human Rights v Zimbabwe (2008) AHRLR 120 (ACHPR 2008) paras 92, 95; *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005). See Christian Tomuschat, ‘Democracy and the Rule of Law’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 485.

⁵³ Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3, arts 3(g), 4(m).

⁵⁴ African Charter on Democracy, Elections and Governance (adopted 30 January 2007, entered into force 15 February 2012) AU Doc Assembly/AU/Dec.147(VIII).

⁵⁵ *ibid* art 2(1).

⁵⁶ *ibid* art 4.

⁵⁷ Jean d’Aspremont, *L’État non démocratique en droit international* (Pedone 2008) 35 (Even though these instruments never expressly refer to the establishment of a democratic regime, no one can seriously contest the fact that the right to free, fair and periodic elections conform with an obligation to establish a democratic regime that does not say its name) (author’s translation).

accordance with the will of states unambiguously defined or whether a more teleological approach is warranted.

4.1.2. Teleological Interpretation

Treaties are not just dry parchments. They are instruments for providing stability to their parties and to fulfill the purposes which they embody. They can therefore change over time, must adapt to new situations, evolve according to the social needs of the international community and can, sometimes, fall into obsolescence.⁵⁸

The preceding section laid bare the multifarious legal instruments containing democratic provisions. While the value of every single document is not to be downplayed, it is undeniably the ICCPR which is of an utmost importance for mapping the universal treaty basis of the right to democratic governance. As of late 2018, the Covenant has attracted 172 ratifications and six signatures. Only 17 states have not undertaken any action in regard to this instrument.

The text of the ICCPR does not indicate how it is to be interpreted. Consequently, by virtue of being ‘an international agreement concluded between States in written form and governed by international law’,⁵⁹ general rules of treaty interpretation, mainly located in articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT), are applicable to it. Notably, due to the non-retroactive character of the Convention, these provisions do not apply to the ICCPR as a treaty law. However, the VCLT came to be viewed as virtually *in toto* reflecting norms of customary international law⁶⁰ and hence

⁵⁸ ILC, Report of the International Law Commission on the Work of Its 60th Session’ (5 May - 6 June and 7 July - 8 August 2008) UN Doc A/63/10, Annex A, 383, para 1.

⁵⁹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 33 (VCLT) art 2(1)(a).

⁶⁰ *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* (Merits) [1991] ICJ Rep 53, para 48 (Stating that the pre-existing principles of treaty interpretation ‘are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the point’); *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v Chad)* (Merits) [1994] ICJ Rep 6, para 41; *Case Concerning Maritime Delimitation and Territorial Questions (Qatar v Bahrain)* (Jurisdiction and Admissibility) [1995] ICJ Rep 6, para 33; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, para 19; *LaGrand Case (Germany v US)* [2001] ICJ Rep 279, para 100; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 94; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, para 160; *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Merits) [2009] ICJ Rep 213, para 47; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14, para 65. This process of growing acceptance of the customary nature of the provisions in question is aptly described by Torres Bernardez, ‘Interpretation of Treaties by the International Court of Justice Following the Adoption of the 1969 Vienna Convention on the Law of Treaties’ in Gerhard Hafner and others (eds), *Liber Amicorum Professor Ignaz Seidl-Hohenverldern: in Honor of His 80th Birthday* (Kluwer Law International 1998) 721ff.

applicable to every international treaty irrespective of the date of its conclusion. Article 31 VCLT provides:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (a) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) Any relevant rules of international law applicable in the relations between the parties.⁶¹

As the previous section revealed, the prevailing text-based (objective) approach to the interpretation of the ICCPR, that is ‘in accordance with the ordinary meaning to be given to the terms of the treaty’, lead many scholars to conclude that the right to democracy is not recognised in this treaty.⁶² However, there is another major approach to treaty interpretation that is espoused by the VCLT on par with the textual approach, namely teleological interpretation, which assumes that treaties are to be interpreted ‘in the light of [...] [their] object and purpose’.⁶³ The object-and-purpose approach to interpretation is particularly relevant in the human rights context, since human rights instruments, as law-making treaties, have different aspirations than contractual agreements between states in that the primary goal of interpretation

⁶¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 33 (VCLT) art 31.

⁶² Anthony Langlois, ‘Human Rights without Democracy? A Critique of the Separationist Thesis’ (2003) 25 Hum Rts Q 990; Niels Petersen, ‘The Principle of Democratic Teleology in International Law’ (2009) 34 Brook J Int’l L 33, 56; Jure Vidmar, ‘The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin?’ (2010) 10 HRL Rev 239, 261; Jure Vidmar, ‘Multiparty Democracy: International and European Human Rights Law Perspectives’ (2010) 23 LJIL 209, 223.

⁶³ There is also a third major school of treaty interpretation — subjective school — according to which the main goal of treaty interpretation is to ascertain the intention of the parties. However, the term ‘intentions of the parties’ does not feature as an independent interpretative element in the VCLT but is rather viewed as being subsumed by textual approach inasmuch as text is presumed to be the authentic expression of the intentions of the parties. See ILC, ‘Report of the International Law Commission on the Work of Its 18th Session’ (4 May — 19 July 1966) UN Doc A/6309/Rev.1, 220, para 11. See also Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester UP 1984) 131 (Stating that ‘there can be no common intentions of the parties aside or apart from the text they have agreed upon’).

of a human rights instrument is the promotion of its effective application (*effect utile*) rather than the ascertainment of the original intent of state parties.

It has long been debated how these interpretative tools (text, context and object and purpose) shall be treated. Some commentators have suggested that literal reading of article 31 presupposes a hierarchy between the three elements, that is they should be employed in the order they stand in the text of the VCLT.⁶⁴ To put slightly differently, the less textually clear a provision becomes, the more recourse to remaining elements is justified. Thus, if text is ambiguous, one could put more weight to context. If the latter does not bring clarity either, one should appeal to object and purpose as a last resort. However, there is now a growing consensus to view the three interpretative formulas as well as the guiding principle of good faith as equal and mutually supplementing tools of treaty interpretation. This came to be known as a holistic approach,⁶⁵ or ‘crucible approach’,⁶⁶ to article 31. This approach transcends the ECtHR’s argument in *Golder*:

In the way in which it is presented in the ‘general rule’ in Article 31 of the Vienna Convention, the process of interpretation of a treaty is a unity, a single combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the Article.⁶⁷

Teleological interpretation is a constitutional interpretation because it aids in revealing the common interest of the international community vested into the text of a treaty, instead of attempting to ascertain a fluctuating, inward-looking, synallagmatic, contextually and temporarily dependent will of an individual state, commonly referred to as ‘intention of state parties’, when it comes to treaty interpretation. Moreover, the generic and abstract nature of the object and purpose as a guiding formula in treaty interpretation ensures a needed flexibility and evolution of the treaty text (in line with global constitutional principles) without the need of an onerous process of amendment or adoption of a new treaty. This notwithstanding, the very notion of ‘object and purpose’

⁶⁴ For a classical defence of this position, see Arnold McNair, *The Law of Treaties* (Clarendon Press 1961) 364-83. See also Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester UP 1984) 130-35; Robert Y Jennings, ‘Treaties’ in Mohammed Bedjaoui (ed), *International Law: Achievements and Prospects*, vol 1 (UNESCO 1991) 135-77. See also *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v Chad)* (Merits) [1994] ICJ Rep 6, para 41 (Pointing out that the interpretation must be based ‘above all upon the text of the treaty’).

⁶⁵ See Richard Gardiner, *Treaty Interpretation* (OUP 2008) 9-10; Isabelle Van Damme, ‘Treaty Interpretation by the WTO Appellate Body’ (2010) 21 EJIL 605, 626.

⁶⁶ The term ‘crucible’ comes from the ILC Commentaries on the Draft VCLT, which characterizes treaty interpretation as a ‘single combined operation’ where text, context and object and purpose are ‘thrown into a crucible’. ILC, ‘Draft Articles on the Law of Treaty with Commentaries’ (1966) 2 YBILC 187, 219-20, para 8; See also Richard Gardiner, *Treaty Interpretation* (OUP 2008) 9-10.

⁶⁷ *Case of Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975) para 30.

is an ‘enigma’⁶⁸ in the sense that there is no exact rule to determine concrete state obligations by reference to it. The most precise definition that scholarly community could agree upon is that it is a ‘unitary concept referring to the goals that the drafters of the treaty hoped to achieve’.⁶⁹ Thus, the idea that a treaty is to be interpreted in light of its object and purpose suggests a holistic mode of interpretation which takes cognisance of the ‘normative logic’ underlying the treaty in its entirety.⁷⁰

Because the HRC in its case law does not usually indicate its method of the identification of the object and purpose of the ICCPR,⁷¹ recourse should be had to general international law. It is a common practice to look at the preamble of a treaty as an expression of its object and purpose.⁷² Albeit treated in article 31 VCLT as part of treaty text and, thus, an obligatory element in text-and-context analysis,⁷³ preambles are more frequently referred to as sources or evidence of a treaty’s object and purpose. This approach is virtually universal and originates from historical practices and conventions of treaty drafting and interpretation.⁷⁴ As Judge Weeramantry posited in relation to the ICJ and arbitral tribunals:

An obvious internal source of reference is the preamble to the treaty. The preamble is a principal and natural source from which indications can be gathered of a treaty’s objects and purposes even though the preamble does not contain substantive provisions. Article 31(2) of the VCLT sets this out

⁶⁸ Isabelle Buffard and Karl Zemanek, ‘The “Object and Purpose” of a Treaty: An Enigma?’ (1998) 3 *Austr Rev Int’l & Eur L* 311, 343.

⁶⁹ David S Jonas and Thomas N Saunders, ‘The Object and Purpose of a Treaty: Three Interpretative Methods’ (2010) 43 *Vand J Transnat’l L* 565, 578; Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 232.

⁷⁰ David S Jonas and Thomas N Saunders, ‘The Object and Purpose of a Treaty: Three Interpretative Methods’ (2010) 43 *Vand J Transnat’l L* 565, 579.

⁷¹ See eg *Johnson v Jamaica* (1994) 6 Selected Decisions of the Human Rights Committee 126, para 8.2(c) (The Committee merely stated that one of the Covenant’s objects and purposes is ‘to promote reduction in the use of the death penalty’ without elaborating how it came to this conclusion); *Choi and Yoon v Republic of Korea* (2007) 9 Selected Decisions of the Human Rights Committee 218, para 8.2 (The Committee asserted that the right to conscientious objection against military service must be assessed solely ‘in the light of article 18 of the covenant, the understanding of which evolves as that of any other guarantee of the covenant over time in view of its text and purpose’. (Emphasis added). The Committee, thus, resorted to a combination of interpretative methods (evolutive, textual and teleological) to justify the right to conscientious objection under article 18 ICCPR without delving into any analysis on how the application and interplay of these interpretative approaches led to such conclusion).

⁷² See eg Isabelle Buffard and Karl Zemanek, ‘The “Object and Purpose” of a Treaty: An Enigma?’ (1998) 3 *Austr Rev Int’l & Eur L* 311, 332 (Suggesting that ‘the title and the preamble of a treaty, and occasionally a programmatic article, are the prime indicators of the purpose of a treaty’).

⁷³ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 33 (VCLT) art 31(2) (Stipulating that ‘[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its *preamble* and annexes [...]’ (emphasis added)).

⁷⁴ Max H Hulme, ‘Preambles in Treaty Interpretation’ (2016) 164 *U Pa L Rev* 1281, 1300.

specifically when it states that context, for the purpose of the interpretation of a treaty, shall comprise in addition to the text, the preamble and certain other materials. The jurisprudence of this Court has made substantial use of it for interpretational purposes [...]. Important international arbitrations have likewise resorted to the preamble to a treaty as guides to its interpretation.⁷⁵

However, given the usually vague, hazy and unrestrained language of preambles, caution is needed. Moreover, both article 31(2) VCLT as well as international practice make clear that one has to read the whole treaty to ascertain its object and purpose. In other words, in order to interpret the treaty in light of its object and purpose, one has to first elucidate the object and purpose by interpreting the whole treaty. To escape the vicious circle, a two-step approach may be useful: firstly, a *prima facie* assumption of the object and purpose of a treaty must be established by having recourse to the preamble of the treaty; secondly, this assumption must eventually be tested against the text of the treaty and all other available material and, if necessary, adjusted according to this test.⁷⁶ Importantly, whenever preamble is employed as an indicator of a treaty's object and purpose, its role is to *limit*, or 'impose interpretative commitments',⁷⁷ to use the wording of Gardiner, but not to radically alter the possible interpretations of a treaty term. In this way, the haziness of the preamble's language is precluded from giving rise to interpretations utterly divergent with the term's ordinary textual reading. However, this is not to say that preamble cannot amplify or somewhat expand the substantive reach of the treaty provisions, particularly considering the wide judicial practice supporting such transformative power of preambles.⁷⁸

Turning to the ICCPR, it refers in its preamble to 'the inherent dignity and of the equal and inalienable rights of all members of the human family', 'inherent dignity of the human person', 'the ideal of free human beings' and the 'creation of conditions whereby everyone may enjoy his civil and political

⁷⁵ *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* (Merits) [1991] ICJ Rep 53, 142 (Dissenting Opinion of Judge Weeramantry). The decisions that he cited, in which the ICJ has relied upon the preamble to a treaty for interpretative purposes, includes *Rights of Nationals of the United States of America in Morocco (France v United States of America)* (Merits) [1952] ICJ 176, 196; and *Asylum Case (Colombia/Peru)* (Merits) [1950] ICJ Rep 266, 282.

⁷⁶ Isabelle Buffard and Karl Zemanek, 'The "Object and Purpose" of a Treaty: An Enigma?' (1998) 3 *Austr Rev Int'l & Eur L* 311, 333.

⁷⁷ Richard Gardiner, *Treaty Interpretation* (OUP 2008) 186.

⁷⁸ For detailed overview and analysis of the judicial practice according strong support to positive force of preambles in expanding treaty terms, see Max H Hulme, 'Preambles in Treaty Interpretation' (2016) 164 *U Pa L Rev* 1281, 1307-17, 1324-30 (Referring to *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1988) WT/DS58/AB/R. 1998, several recent decisions by international investment tribunals and decisions by the ICJ, including the 1952 *Nationals of the United States of America in Morocco*, the 1991 *Arbitral Award of 31 July 1989, Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (Merits) [2002] ICJ Rep 625 and *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Merits) [2012] ICJ Rep 624.

rights, as well as his economic, social and cultural rights'.⁷⁹ It is, therefore, fair to suggest that the object and purpose of the Covenant is to promote human dignity, equality, self-realisation and political empowerment. It is against the backdrop of these objectives that every article of the Covenant is to be interpreted, including article 25 (right to elections) — the principal treaty source of the democratic entitlement. Strikingly, these objectives immediately recall the underlying principles of democracy, namely equality and self-determination.

Whilst it is clear that the aforementioned objectives are still too generic to serve as a helpful guide for the interpretation of other treaty provisions, they, nonetheless, have certain implications on the quality of democracy as envisaged in article 25 ICCPR. For instance, it is difficult to imagine how authoritarian governments, whether fully lacking any electoral basis for their formation or with electoral competition of some kind, that curtail the full enjoyment of civil and political rights of their subjects by, among others, manipulating the results of elections, if not completely banning those, restricting the participation of various political fractions, assuming unfettered control over decision-making between elections, eroding the system of checks and balances between various branches of government, disrespecting the rule of law and the like, are to be judged as adhering to the underlying objectives of human dignity, equality and self-empowerment proclaimed in the preamble to the ICCPR. In this sense, authoritarian and competitive authoritarian regimes fall foul of complying with article 25 of the Covenant. Thus, the Covenant's object and purpose derived from its preamble restricts the range of choices governments can make with respect to their political system.

It is also unconceivable how free and fair elections could be non-plural. While the expression 'free and fair' is not explicitly used in the Covenant, which instead refers to 'genuine periodic elections [...] by universal and equal suffrage [...] and by secret ballot', recent state practice supported by universal *opinio juris* evidences the general consensus that any democratic elections shall be organised according to the standards of 'free and fair' in order to meet the requirements of article 25 ICCPR and other relevant instruments.⁸⁰ Thus, it is plausible that the obligation to ensure participation of citizens on the basis of free and fair elections is a customary law obligation existing beyond the treaty obligation under article 25 ICCPR. Such invocation of extraneous standards in ascertainment of the Covenant's terms seems to be in line with article 31(3) VCLT, which stipulates that treaty interpretation can be affected by '[a]ny subsequent practice in the application of the treaty which establishes

⁷⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) preamble.

⁸⁰ See eg Eric C Bjornlund, *Beyond Free and Fair: Monitoring Elections and Building Democracy* (John Hopkins UP 2004) ch 6; Guy S Goodwin-Gill, *Free and Fair Elections* (2nd edn, Inter-Parliamentary Union 2006) 134, 163. See also Centre for Human Rights, *Human Rights and Elections — A Handbook on the Legal, Technical and Human Rights Aspects of Elections* (United Nations 1994).

the agreement of the parties regarding its interpretation',⁸¹ as well as with the Covenant's object and purpose.

For an election process to be *free*, the legal barriers to entry into the political space should be minimal. It means an effective protection of the freedoms of assembly, association, movement and speech for all political stakeholders, including voters and candidates/parties. There should be no coercion or intimidation in relation to the exercise of electoral choices.⁸² Elections are *fair* when they are administered impartially by competent authorities without fraud or manipulation ensuring a level playing field for all political stakeholders, when independent monitoring of electoral process is allowed, and when any election-related disputes and complaints are promptly resolved.⁸³ These principles are formally endorsed in the 1990 Copenhagen Document of the Organisation for Security and Cooperation in Europe (OSCE)⁸⁴ and in the 1994 Declaration on Criteria for Free and Fair Elections of the Inter-Parliamentary Union (IPU).⁸⁵

It is also fair to suggest that the expression '*genuine* elections' in ICCPR article 25 conceptually incorporates the standard of free and fair. On this view, the adjective '*genuine*' serves as a nexus between article 25 and other adjacent rights, such as the rights to freedom of expression (article 19), assembly (article 21), association (article 22) and movement (article 12) and freedom from discrimination (article 2). At the very least, it entails a real choice for voters between various electoral platforms, which undoubtedly presupposes multipartyism. General Comment 25 of the HRC⁸⁶ as well as its jurisprudence⁸⁷ affirm this interpretation. Likewise, UNGA resolutions reflect the importance of multiparty elections for the effective enjoyment of the right to political participation: '[D]etermining the will of the people requires an electoral process that provides an equal opportunity for all citizens to become candidates and put forward their political views, individually and in co-operation with others'.⁸⁸ It is also becoming a common ground within

⁸¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 33 (VCLT) art 31(3).

⁸² See Larry Diamond, 'Thinking about Hybrid Regimes' in Larry Diamond and Marc F Plattner (eds), *Democracy: A Reader* (The Johns Hopkins UP 2009) 236.

⁸³ Jorgen Elklit and Palle Svensson, 'What Makes Elections Free and Fair?' (1997) 8 *Journal of Democracy* 32, 35. See also Eric C Bjornlund, *Beyond Free and Fair: Monitoring Elections and Building Democracy* (The John Hopkins UP 2004) 96-99.

⁸⁴ OSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990) para 6 <<http://www.osce.org/odihr/elections/14304>> accessed 29 August 2016.

⁸⁵ Inter-Parliamentary Council, Declaration on Criteria for Free and Fair Elections (26 March 1994) <<http://www.ipu.org/cnl-e/154-free.htm>> accessed 29 August 2016.

⁸⁶ UNHRC 'General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote)' (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 8 ('Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association').

⁸⁷ *Bwalya v Zambia* (1988) 5 *Selected Decisions of the Human Rights Committee* 23, para 6.6.

⁸⁸ UNGA Res 45/150 (18 December 1990) UN Doc A/RES/45/150, para 3.

international legal circles that in order for a state to be considered as complying with its obligations under the Covenant, it should guarantee its citizens a ‘meaningful choice’ between political parties and agendas.⁸⁹

One may doubt, however, whether for the determination of the treaty’s object and purpose one may look beyond the treaty itself. In other words, it is not clear whether the meaning of ICCPR article 25 may be determined by reference to such external sources as the ‘free and fair’ standard, not explicitly incorporated into the text of the Covenant, and instruments of international institutions, such as the HRC and the UNGA. However, state practice as well as court’s jurisprudence display that a treaty’s object and purpose is not restricted to the treaty itself but can also be extrapolated from extraneous rules.⁹⁰ Thus, apart from looking at the treaty’s preamble as a material embodiment of its object and purpose, it is also possible to conceive of object and purpose of a treaty as ‘a normative element [existing] beyond the rules laid down in a treaty’.⁹¹ On this understanding, object and purpose can be defeated independently from a violation of the treaty’s actual terms.⁹² The case of *Namibia* is a good illustration of the application of this observation in practice. The facts of the case reveal that when states questioned the status of South Africa as mandatory in relation to South West Africa (Namibia) they referred to its violation of other instruments, such as the UN Charter and the UDHR.⁹³ In the same vein, the ECtHR in the *Golder* case, while recognising the importance of the treaty’s preamble in ascertaining its object and purpose, also appealed to the Statute of the Council of Europe to determine the scope of article 1 ECHR.⁹⁴ As the Court explained, for the determination of the object and purpose of the ECHR’s provisions, the account should be taken of ‘any relevant rules and principles of international law, applicable between the parties’.⁹⁵ Albeit, in contrast to the ECtHR, the HRC has frequently interpreted the ICCPR’s provisions without the recourse to external instruments, preferring instead to draw support from its general comments or the

⁸⁹ Niels Petersen, ‘The Principle of Democratic Teleology in International Law’ (2009) 34 *Brook J Int’l L* 33, 55.

⁹⁰ Jan Klabbbers, ‘Some Problems Regarding the Object and Purpose of Treaties’ (1997) 8 *Finnish YBIL* 138, 142-43.

⁹¹ Willem Riphagen, ‘State Responsibility: New Theories of Obligations in Interstate Relations’ in Ronald St John MacDonald and Douglas M Johnston (eds), *The Structure and Process of International Law* (Martinus Nijhoff 1983) 581, 601.

⁹² This position is taken by, inter alia, the ICJ in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, 135-42.

⁹³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, 46, para 92. See also Written statement by the Government of the United States of America, *Pleadings, Oral Arguments and Documents*, Vol 1 [1971] ICJ Rep 843, 863-64.

⁹⁴ *Case of Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975) para 34.

⁹⁵ *Demir and Baykara v Turkey* (2008) 48 EHRR 1345, paras 67, 76.

preparatory works of the Convention,⁹⁶ more recent decisions appear to give bigger credence to the extraneous sources, such as international conventions, to illuminate the object and purpose of the ICCPR's provisions.⁹⁷

Noteworthy, Klabbers warned that such an expanded understanding of teleological interpretation is not unproblematic as introducing new obligations through the backdoor of object and purpose undermines law's clarity and predictability. As he pertinently observed, '[w]hile one of the possible attractions of international law is, generally speaking, its indeterminate (some would say flexible) nature, the turning point is reached where indeterminacy lapses into "anything goes"'.⁹⁸ In the present case, however, applying the standards of free and fair elections that are developed through state practice and are universally endorsed is not equivalent to 'anything goes'. The panoply of adjacent rights, such as the rights to freedom of expression, assembly, association and movement and the freedom from discrimination as applied in conjunction with article 25 ICCPR, provide a skeleton for a more fine-grained standard of free and fair. That said, states falling short of ensuring free and fair elections renege on their obligations under the ICCPR. In other words, teleological interpretation of article 25 ICCPR restricts the liberty of individual states to choose their form of government.

Some may object to this seemingly sweeping conclusion by arguing that such complex multilateral treaties as human rights treaties may have plurality of objects and purposes, sometimes contradictory ones. This means that the object and purpose of a human rights treaty cannot be ascertained by merely referring to the treaty's preamble but has to be weighted against, and adjusted in accordance with, the objects and purposes of separate articles of the treaty. This observation can draw some support from the definition of object and purpose by the HRC, which contends that '[i]n an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the Covenant'.⁹⁹ Similarly, Sinclair emphasised that 'most treaties have no single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes'.¹⁰⁰ It

⁹⁶ See eg *Antti Vuolanne v Finland* (1987) 3 Selected Decisions of the Human Rights Committee 159, para 9.3 ('[T]he travaux préparatoires as well as the Committee's general comments indicate that the purpose of the Covenant was to proclaim and define certain human rights for all and to guarantee their enjoyment'). See also *Choi and Yoon v Republic of Korea* (2007) 9 Selected Decisions of the Human Rights Committee 218, para 8.2.

⁹⁷ See eg *Sarma v Sri Lanka* (2003) 8 Selected Decisions of the Human Rights Committee 210, para 9.3; *Sharma v Nepal* Comm no 1469/2006 (6 November 2008) UN Doc CCPR/C/94/D/1469/2006, para 7.4; *Maodoui v Algeria* Comm no 1495/2006 (1 December 2008) UN Doc CCPR/C/94/D/1495/2006, para 7.2.

⁹⁸ Jan Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties' (1997) 8 Finnish YBIL 138, 160.

⁹⁹ UNHRC 'General Comment No 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant' (1994) UN Doc CCPR/C/21/Rev.1/Add.6, para 7.

¹⁰⁰ Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester UP 1984) 130.

follows from the aforementioned that each article of the ICCPR may have a distinct object and purpose.

The most widely defended incompatibility between such plurality of objects and purposes has been observed with respect to articles 1 (self-determination) and 25 ICCPR. Article 1 vests in the people the right to determine their political, social and economic system. Because the primary concern of the article is the people's control and autonomy over issues directly pertaining to them, it has been suggested that the people have the right to choose any political system, including outright dictatorship. To proclaim democracy the only form of realisation of self-determination is to restrict the range of choices to which peoples are legitimately entitled.¹⁰¹ This interpretation finds at least a partial support in the pronouncement of the HRC contending that

The rights under article 25 are related to, but distinct from, the right of peoples to self-determination. By virtue of the rights covered by article 1(1), peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs.¹⁰²

Following this line of reasoning, one may conclude that articles 1 and 25 ICCPR pursue different and at times diametrically opposed goals. Whereas article 25 is concerned with citizens' participation in political decision-making on a continuous basis, article 1, on the contrary, envisages people's right to determine their political destiny as a one-time event — what has been termed as 'one man, one vote, one time'¹⁰³ — including the possibility to abolish such participation in the future. In other words, article 25 of the Covenant cannot be interpreted as restricting the liberty of states to choose their political system, as such interpretation is at loggerheads with article 1.

Notwithstanding the seemingly solid legal reasoning animating such conclusion, it is imperative to note that the contemporary understanding of self-determination has evolved from the one confined to colonial context to the doctrine concerned with internal structure of states and democratic legitimacy.¹⁰⁴ On this view, the right to elections informs how the right to

¹⁰¹ See eg Niels Petersen, 'The Principle of Democratic Teleology in International Law' (2009) 34 *Brook J Int'l L* 33, 51; Jure Vidmar, 'The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin?' (2010) 10 *HRL Rev* 239, 257, 263.

¹⁰² UNHRC 'General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote)' (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 2.

¹⁰³ Richard Burchill, 'The Developing International Law of Democracy' (Review Article) (2001) 64 *MLR* 123, 128.

¹⁰⁴ See eg Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *AJIL* 46, 52, 58-59; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) 54, 320-22; Linos-Alexandre Sicilianos, *L'ONU et la démocratisation de L'État: systèmes régionaux et ordre juridique universel* (Pedone 2000) 130. See also UN Sub-Commission on the Promotion and Protection of Human Rights 'Explanatory note concerning the draft declaration

determine political status is to be exercised. Because peoples, and not their governments, are the repository of the right to choose a political system, this decision can only be effectuated through democratic mechanisms, as non-democratic means are not attributable to the people. The right of the people of one historical moment to deprive future generations from the power to decide in the same manner is hard to justify.¹⁰⁵ This would effectively mean that a people passed their power to determine the content of self-determination to their government, which would lead to a paradoxical situation where the principle of self-determination and the principle of state sovereignty would coincide and, thus, the former would lose any independent value.¹⁰⁶ It follows that the modern conception of self-determination is inconceivable without a democratic system of government. Consequently, objects and purposes underlining the two articles, namely government representativeness and accountability, popular sovereignty and political equality, are not only incompatible but increasingly synonymous and mutually reinforcing, which has even led one prominent scholar to conclude that '[t]he right of peoples to self-determination, taken with the rights of citizens to political participation, creates an obligation for the 150-plus States parties to the [ICCPR] to both introduce and maintain democratic forms of government'.¹⁰⁷

Other articles of the ICCPR too may have distinctive objectives specific to the nature of the rights and freedoms they enshrine. Consider, for example, article 27 ICCPR, providing for the right of ethnic, linguistic and religious minorities to enjoy their own culture. Albeit akin to articles 1 and 25 ICCPR (and in fact the Covenant as a whole), the objectives of article 27 are political empowerment, popular sovereignty and equality, these objectives are solely relevant for minorities with respect to the majority of population. The tension, hence, exists between political autonomy of separate ethno-cultural groups envisaged by article 27 and general objectives of political equality in decision-making animating articles 1 and 25. It is commonly asserted that the electoral process as articulated in article 25 ICCPR can lead to a 'tyranny of majority'.¹⁰⁸ Although it is theoretically accepted that in democracy the entire population is entitled to participate in the elections of representatives, who in their turn partake in the political decision-making on behalf of the population, this does not necessarily lead to the equal enjoyment of rights by everyone. In the extreme case, the electorally-formed power of majority may lead to violation, not fulfilment, of rights of numerically inferior groups.

on the rights of indigenous peoples' by Erica-Irene A Daes (19 July 1993) UN Doc E/CN.4/Sub.2/1993/26/Add.1, para 17.

¹⁰⁵ Niels Petersen, 'The Principle of Democratic Teleology in International Law' (2009) 34 *Brook J Int'l L* 33, 52. See also Thomas Christiano, 'An Instrumental Argument for a Human Right to Democracy' (2011) 39 *Phil & Pub Aff* 142, 173.

¹⁰⁶ James Crawford, 'The Rights of Peoples: "Peoples" or "Governments"?' in James Crawford (ed), *The Right of Peoples* (2nd edn, OUP 1992) 56.

¹⁰⁷ Steaven Wheatley, *Democracy, Minorities and International Law* (CUP 2005) 136.

¹⁰⁸ See eg David Raic, *Statehood and the Law of Self-Determination* (Martinus Nijhoff 2002) 280; Russell Miller, 'Self-Determination in International Law and the Demise of Democracy?' (2003) 41 *Colum J Transnat'l L* 601, 634-644.

However, such election-centred understanding of democracy is not supported by state practice. As has been previously indicated, the HRC recognised the importance of other ‘essential conditions’ for the effective exercise of the right to vote, such as freedoms of expression, assembly and association, which, in their turn, mitigate the distortive results of elections. Moreover, states are required to undertake positive measures to ensure that the right to elections is meaningful, including the availability of election materials in minority languages.¹⁰⁹ In the general comment specifically relating to article 27 ICCPR, the HRC reiterated the importance of positive measures both against the acts of the state party itself and the acts of other persons within the state ‘aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27’. For the Committee, such measures amount to legitimate differentiation under the Covenant and, thus, do not undermine the prohibition of discrimination laid down in articles 2(1) and 26 ICCPR.¹¹⁰ Moreover, it should not be forgotten that one of the distinct values of democracy is that it provides a possibility for *everyone* to actively partake in decisions that affect one’s fulfilment of basic human rights: ‘Inasmuch as people are social beings [...] engaging in common or joint activities with others can be seen as itself one of the prime conditions for their freedom’, as itself a human right.¹¹¹ In this sense, the right to democracy is indispensable means, if not the most effective way, to ensure the widest adherence to all human rights, including the rights of minorities. It follows that objectives of articles 27 and 25 are not mutually exclusive but conceptually interdependent, in that genuine democracy is inconceivable without the protection of minority rights, just like the full realisation of minority rights is only possible in democratic society. By the same token, any other right recognised in the Covenant by virtue of its civil and political nature, because it restricts unwarranted encroachments by governments upon individual rights (hence, the title of the Covenant), relies on the democratic framework for its realisation. It follows that interpreting article 25 ICCPR in light of the Covenant’s object(s) and purpose(s) implies the right to democratic governance vested in the people and a corresponding duty upon states to introduce and maintain democracy as the only form of government compatible with the Covenant.

The expression ‘object and purpose’ also features in article 18 VCLT which states that:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

¹⁰⁹ UNHRC ‘General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote)’ (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 12.

¹¹⁰ UNHRC, ‘General Comment No 23: The Rights of Minorities (Art 27)’ (1994) UN Doc CCPR/C/21/Rev.1/Add.5, paras 6.1, 6.2.

¹¹¹ Carol G Gould, ‘The Human Right to Democracy and Its Global Import’ in Cindy Holder and David Reidy (eds), *Human Rights: The Hard Questions* (CUP 2013) 292.

- (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty [...].

Thus, the article, which came to be known as ‘interim obligation’, forbids signatory states from committing any acts that would undermine the object and purpose of a treaty between signature and its entry into force. Hence, the signature is neither purely ceremonial nor does it fully bind a state in respect of a treaty. Rather it produces a commitment to a threshold level of cooperation that is relied upon by other states in their relationship with a signatory.¹¹² As was mentioned earlier, the ICCPR, apart from being ratified by 172 states, has attracted six signatures, including that of the People’s Republic of China¹¹³ – one of the world’s super-power notorious for its non-democratic, one-party regime, which in the words of one scholar ‘makes an ongoing mockery of the right of China’s 1,3 billion citizens to any genuine form of democracy or self-determination’.¹¹⁴ Is it acting in violation of the ICCPR?

Some commentators contend, that article 18 VCLT is of little use when it comes to law-making treaties since its original purpose was to serve in the restricted confines of contractual situations.¹¹⁵ However, the plain language of article 18 does not reveal any distinction between various types of treaties intended to be governed by the article. Moreover, the fact that human rights treaties are not strictly contractual in nature but seek to engender norms of general application, that is law-making treaties, which encapsulate values of international community at large and not merely reciprocal state undertakings, it is counterintuitive to claim that states can act as they please ‘simply because the calendar has not yet reached a certain date’.¹¹⁶ To clarify the issue, Klabbers proposed a ‘manifest intent test’ under which ‘where behaviour pending entry into force of an agreement is generally held to be morally obnoxious in light of what the agreement itself represents, then it violates the interim obligation’.¹¹⁷ However, the manifest intent test is arguably highly subjective and fails to provide a clear-cut standard for proving manifestation of lofty motivations. A new test — the so-called ‘status quo test’ — has been advanced in order to overcome these uncertainties. In short, this test concentrates on preserving the status quo at the time of signature. States do not assume any new obligations upon signing a treaty but are only restricted to follow their ordinary patterns of behaviour and should refrain from committing new ‘transgressions’. Thus, ‘a state’s presumptively voluntary pattern of conduct

¹¹² David S Jonas and Thomas N Saunders, ‘The Object and Purpose of a Treaty: Three Interpretative Methods’ (2010) 43 Vand J Transnat’l L 565, 595-96.

¹¹³ Other signatories, which are small island nations, include Comoros, Cuba, Nauru, Palau and Saint Lucia, available at <<http://indicators.ohchr.org>> (accessed 22 February 2018).

¹¹⁴ Robert D Sloane, ‘The Changing Face of Recognition under International Law: A Case Study of Tibet’ (2002) 16 Emory Int’l L Rev 107, 110.

¹¹⁵ Jan Klabbers, ‘How to Defeat a Treaty’s Object and Purpose Pending Entry into Force: Toward Manifest Intent’ (2001) Vand J Transnat’l L 283, 331.

¹¹⁶ *ibid* 286.

¹¹⁷ *ibid* 331.

becomes obligatory'.¹¹⁸ It follows that under the manifest intent test China can be viewed as violating article 25 ICCPR, while under the status quo test no such violation occurs. Thus, which test is to be preferred?

It is widely acknowledged that the interim obligation of article 18 is in essence an obligation of good faith: states concerned are not duty-bound to comply with the treaty *in toto* but nor can they frustrate its very essence, thus, rendering its entry into force *de facto* meaningless.¹¹⁹ Moreover, the content of the interim obligation is shaped by the object and purpose of the treaty as a whole as well as the object and purpose of individual treaty provisions. In certain circumstances, the protection of the treaty's object and purpose requires some active conduct to prevent the treaty from becoming meaningless. In one isolated case, the ECtHR incidentally raised the question of the application of article 18 VCLT in the context of human rights treaties. In *Öcalan v Turkey*, the Court held that the imposition of the death penalty by a Turkish court amounted to a violation of article 2 ECHR. To justify this conclusion, it noted that

It must also be borne in mind in this context that Turkey has now signed Protocol No. 6 [...] and that the non-implementation of the capital sentence is in keeping with Turkey's obligations as a signatory State to this Protocol, in accordance with Article 18 of the Vienna Convention of 23 May 1969 on the Law of Treaties, to 'refrain from acts which would defeat the object and purpose' of the Protocol'.¹²⁰

Thus, in the Court's view, the mere signature of Protocol 6 to the ECHR (ECHR-P6), whose main object and purpose is the abolishment of the death penalty, gave rise to an obligation on the signing state to refrain from acts of capital punishment. It is, hence, clear that the Court opted for a manifest intent test. Applied to the issue in question, this would mean that states-signatories to the ICCPR which maintain non-democratic form of government are in violation of the Covenant's object and purpose. Yet, one should be careful in reaching such a conclusion. Unlike narrow treaties whose object and purpose are relatively easy to determine, like ECHR-P6, the ICCPR is a substantively broad treaty including multiple objects and purposes, of which political participation is but one, albeit essential, objective. Moreover, one has to acknowledge the almost complete lack of practice relating to claims of responsibility for breaches of article 18 VCLT. Such unwillingness by states to

¹¹⁸ David S Jonas and Thomas N Saunders, 'The Object and Purpose of a Treaty: Three Interpretative Methods' (2010) 43 Vand J Transnat'l L 565, 605.

¹¹⁹ Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 220. See also Werner Morvay, 'The Obligation of a State Not to Frustrate the Object of a Treaty Prior to Its Entry into Force' (1967) 27 ZaöRV 451, 454; Jan Klabbers, 'Strange Bedfellows: The "Interim Obligation" and the 1993 Chemical Weapon Convention' in Eric Myjer (ed), *Issues of Arms Control Law and the Chemical Weapons Convention: Obligations Inter Se and Supervisory Mechanisms* (Kluwer Law International 2001) 11, 14.

¹²⁰ *Öcalan v Turkey* App no 46221/99 (ECtHR, 12 March 2003) para 185.

take action to engage responsibility in case of a breach of this article can be explicated by the fact that the wrongdoing state, after having signed the treaty, has a possibility to refrain from ratifying it by making its intention clear not to become a party to the treaty. Since in respect to human rights treaties the attainment of broad ratification is essential for its effectiveness, the invocation of article 18 is less than appealing.¹²¹ It follows that the object-and-purpose approach to interpretation cannot be stretched as far as to hold China and other non-democratic countries which have merely signed the ICCPR responsible for violating article 25 of the Covenant.

4.1.3. Evolutive Interpretation and the Principle of Systemic Integration

The consideration of object and purpose of a treaty on the same footing as text opened the door to an evolutive (or dynamic) approach to interpretation, since object and purpose may require that a term is interpreted evolutively. In this sense, teleological and evolutionary approaches go hand in hand. In short, evolutive interpretation means that a meaning given to a text changes over time. As the ICJ declared:

The Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.¹²²

It follows that treaty provisions are to be interpreted in the context of modern developments and against the background of general international law of the day. While it is clear that the ICJ has resorted to this approach on several occasions, the roots of the evolutive approach lie in the interpretative practice

¹²¹ Paolo Palchetti, 'Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means of Strengthening Legal Cooperation?' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 32-33.

¹²² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 53. The Court also adopted the evolutive approach to treaty interpretation in *Aegean Sea Continental Shelf Case (Greece v Turkey)* (Merits) [1978] ICJ Rep 3, para 77 (Holding that provisions of the 1928 Act were hardly 'intended to have a fixed content regardless of the subsequent evolution of international law'); *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Merits) [1997] ICJ Rep 7, para 112 ('[T]he Treaty is not static and is open to adapt to emerging norms of international law'); *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Merits) [2009] ICJ Rep 213, para 64 ('[I]t is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied').

of international human rights bodies characterised by an array of such interpretative techniques as principles of ‘autonomous concepts’, ‘living instrument’, ‘effectiveness’ and ‘practicality’ developed by the ECtHR;¹²³ the ‘responsiveness to African circumstances’ in the context the African Commission on Human and Peoples’ Rights;¹²⁴ the consideration of the ‘real situation’ propagated by the IACtHR;¹²⁵ and the ‘dynamic instrument doctrine’ in the case of the Committee against All Forms of Discrimination against Women.¹²⁶ These techniques embody general understanding of how the general rule of interpretation under the VCLT can be applied to further treaty’s object and purpose.

Evolutive interpretation has been as much criticised as it was defended. While, for some, it could generate meanings that are a far cry from what states originally intended,¹²⁷ for others, it is in a strict accordance with article 31 VCLT and particularly relevant in the context of human rights obligations.¹²⁸ This thesis argues that inasmuch as international law stands as a guardian of the common interest, it is to be interpreted teleologically, dynamically and evolutively. This is clearly discernible in the practice of the ICJ, which, whilst following the static approach as a basic rule, increasingly invokes dynamic interpretation to terms whose content the parties expected would change through time.¹²⁹

¹²³ *Tyrer v United Kingdom* (1978) 2 EHRR 1, para 31; *Chassagnou and others v France* (1999) 29 EHRR 615, para 100; *Selmouni v France* (1999) 29 EHRR 32, para 101; *EB v France* App no 43546/02 (ECtHR (GC) 22 January 2008) para 92; *Saadi v United Kingdom* App no 13229/03 (ECtHR (GC) 29 January 2008) para 55. For an academic discussion, see eg Daniel Rietiker, ‘The Principle of “Effectiveness” in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law — No Need for the Concept of Treaty *Sui Generis*’ (2010) 79 Nord J Int’l L 245; Kanstantsin Dzehtsiarou, ‘European Consensus and the Evolutive Interpretation of the European Convention on Human Rights’ (2011) 12 German LJ 1730.

¹²⁴ *The Social-Economic Rights Action Centre and the Centre for Economic and Social Rights/Nigeria* Decision on Communication No 155/96 (2001) AHRLR 60, para 68.

¹²⁵ *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process Law* (Advisory Opinion) (1999) IACtHR Series A no 16. See also Lucas Lixinski, ‘Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law’ (2010) 21 EJIL 585.

¹²⁶ CEDAW ‘General Recommendation No 25: Temporary Special Measures’ (2004) UN Doc HRI/Gen/1/Rev.7, 282, para 3. See also Basak Cali, ‘Specialized Rules of Treaty Interpretation: Human Rights’ in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 541.

¹²⁷ Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester UP 1984) 121; James Crawford, ‘A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties’ in Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 31.

¹²⁸ Lucius Caflish and Antonio A Cancado Trindade, ‘Les Conventions Americaine et Européenne des Droits de l’Homme et le Droit International General’ (2004) 108 RGDIP 5, 12; Basak Cali, ‘Specialized Rules of Treaty Interpretation: Human Rights’ in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 531. See also Detlev F Vagts, ‘Treaty Interpretation and the New Ways of Law Reading’ (1993) 4 EJIL 472, 499.

¹²⁹ See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 53 (The dynamic approach was applied to the phrase ‘sacred trust of civilization’); *Aegean Sea Continental Shelf Case (Greece v Turkey)* (Jurisdiction)

In the context of the ICCPR, the question hence arises as to what interpretation one should give priority to: the one that implies interpretation of treaties in the context of rules of international law in force at the time of the conclusion of the treaty (contemporaneous) or the one taking into account subsequent changes in law (evolutive). The interpretative practice of the HRC does not evidence any clear evolutionary approach. Respect for state sovereignty and consensual basis of international law seem to animate its jurisprudence. However, its recent case law evidences a more frequent recourse to evolutive interpretation by, for example, acknowledging the special nature of the ICCPR as a living instrument¹³⁰ and making references to external sources in broadening the scope of the Covenant's provisions,¹³¹ albeit in a rather restrictive manner.

On a more theoretical level, there are several justifications for the special weight given to evolutive interpretation of the ICCPR. First of all, the ICCPR, by virtue of being a human rights treaty reflecting interests of the international community as a whole and concluded for an indefinite duration, implies a dynamic approach to interpretation as a means to ensure that human rights enshrined therein are protected effectively. Since the Covenant was adopted some half century ago, it is inconceivable that its provisions are static and not shaped by recent developments animating the fields of international law in general and human rights in particular. It should be an instrument of development and improvement rather than an 'end-game treaty',¹³² which froze the state of affairs that existed 50 years ago. Moreover, the generality and breadth of the Covenant's terms as well as their non-reciprocal nature (in that they reflect obligations vis-à-vis individuals, not states *inter partes*) presupposes their interpretation in light of the present-day international consensus on their meaning and scope. The constitutional rationale bolsters these considerations. As has been previously posited, global constitutionalism is a species of new liberalism. Unlike classical international law being essentially reactive in nature and reflecting no common interest beyond the sum of interests of individual states, constitutionalisation of international law assumes the existence of common values embodied in the constitutional principles of the rule of law, human rights and democracy, which provide for a

[1978] ICJ Rep 3, para 77 (Evolutive interpretation was again applied to the formula 'territorial status'); *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Merits) [2009] ICJ Rep 213, para 66 ('[W]here the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is "of continuing duration", the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning').

¹³⁰ *Judge v Canada* (1988) 8 Selected Decisions of the Human Rights Committee 85, para 10.3

¹³¹ *Sarma v Sri Lanka* (2003) 8 Selected Decisions of the Human Rights Committee 210, para 9.3; *Sharma v Nepal* Comm no 1469/2006 (6 November 2008) UN Doc CCPR/C/94/D/1469/2006, para 7.4; *Maodoui v Algeria* Comm no 1495/2006 (1 December 2008) UN Doc CCPR/C/94/D/1495/2006, para 7.2.

¹³² Jared Wessel, 'Relational Contract Theory and Treaty Interpretation: End-Game Treaties v Dynamic Interpretation' (2004) 60 Ann Surv Am L 149, 149.

new source of legitimacy of international law (with the old ones being voluntarism and formalism). Such value-embeddedness of international law allows questioning existing legal norms that do not seem to fit into the value system any longer.¹³³ In this sense, the value approach presupposes interpretation of established rules in light of the aforementioned global constitutional principles, which states themselves recognised in a wide plurality of modern-day instruments, hard and soft. Such widely endorsed array of principles forms the basis for international consensus on issues that the international community finds essential for its existence and proper functioning. It is, thus, tempting to suggest that the principle of evolutive interpretation is a constitutional principle to the extent that it accounts for developments animating the formation of international consensus, independently of the intentions of individual states. Another constitutional feature of the evolutionary approach to interpretation is its unifying role: it unites various bodies of international law into coherent paradigm. And unity constitutes one of *modi operandi* of global constitutionalism.¹³⁴ Because regional human rights systems exemplify strong evolutionary trends in their interpretative techniques, it seems fair to suggest that interpretation of the ICCPR should accommodate those techniques to secure a unified approach to treaty interpretation in the field of human rights. The term ‘should’ in this connection does not indicate any *de lege ferenda* nature of the argument. It merely describes the unfortunate fact that the HRC and other subjects of interpretative community fail to fully employ the array of interpretative possibilities envisaged in the VCLT. This merits a closer inspection.

Evolutive interpretation envisages that terms of a treaty evolve by virtue of a changing context in which they operate, by virtue of treaty’s object and purpose and other developments, such as subsequent agreements, practice and overall legal framework. As to the latter, article 31(3)(c) (interpretation of treaties against the backdrop of general international law) is of a particular importance. It provides that ‘any relevant rules of international law applicable in the relations between the parties’ shall be taken into account in the interpretation of a treaty. That said, the central objective of the article is to ensure that a treaty is not interpreted in a vacuum but is considered as a part of a wider legal system. In other words, a treaty must be interpreted and applied in view of its relationship with its normative environment.

In fact, evolutive approach to interpretation serves as a nexus between article 31(3)(c) and article 31(1) VCLT (general rule of interpretation). Until very recently, article 31(3)(c) fell into such a disdain that, as Sands put it, it has ‘been expressly relied upon only very occasionally in judicial practice’, and had ‘attracted little academic comment’.¹³⁵ However, a renewed interest in this

¹³³ Thomas Kleinlein, ‘Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law’ (2012) 81 Nord J Int’l L 79, 89.

¹³⁴ Surenda Bhandari, *Global Constitutionalism and the Path of International Law* (Brill Nijhoff 2016) 24.

¹³⁵ Philippe Sands, ‘Treaty, Custom and the Cross-fertilization of International Law’ (1998) 1 Yale HR & Dev LJ 85, 95. Likewise, French noted that ‘as a feature of treaty interpretation it

article spearheaded by the ICJ in *Oil Platforms*¹³⁶ and followed by other international tribunals as well as legal commentators¹³⁷ and ultimately by the ILC itself¹³⁸ succinctly illustrates the transformation of international law from a horizontal, sovereignty-based system to a ‘comprehensive blueprint for social life’.¹³⁹ As some scholars contend, the very fact that ‘[t]his is the first time that the Court [in *Oil Platforms*] has expressly used this rule of interpretation’, indicates that it ‘must be assessed as an action in favour of the unity of the international legal system’¹⁴⁰ and, hence, speaks for the constitutionalisation of international law. It is thus possible to assume that article 31(3)(c) expresses a fundamental constitutional principle of treaty interpretation, namely that of *systemic integration*,¹⁴¹ which can be said to constitute a subspecies of the principle of teleological interpretation in general and the principle of evolutive interpretation in particular. The ILC defined the principle of systemic integration as ‘a guideline according to which treaties should be interpreted against the background of all the rules and principles of international law – in other words, international law *understood as a system*’.¹⁴²

has long since been marginalized and ignored’. Duncan French, ‘Treaty Interpretation and the Incorporation of Extraneous Legal Rules’ (2006) 55 ICLQ 281, 300.

¹³⁶ *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Merits) [2003] ICJ Rep 161, para 41 ([U]nder the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account “any relevant rules of international law applicable in the relations between the parties” (Art. 31, para. 3 (c))’).

¹³⁷ Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 ICLQ 279; Anja Lindroos and Michael Mehling, ‘Dispelling the Chimera of “Self-Contained Regimes”: International Law and the WTO’ (2005) 16 EJIL 857; Alan Boyle, ‘Further Development of the Law of the Sea Convention: Mechanisms for Change’ (2005) 54 ICLQ 563; WTO, *European Communities: Measures Affecting the Approval and Marketing of Biotech Products – Reports of the Panel* (29 September 2006) WT/DS291/R, WT/DS292/R and WT/DS293/R; Ben McGrady, ‘Fragmentation of International Law or “Systemic Integration” of Treaty Regimes: EC-Biotech Products and the Proper Interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties’ (2008) 42 JWT 589; Philippe Sands and Jeffery Commission, ‘Treaty, Custom and Time: Interpretation/Application?’ in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff 2010) 41ff; Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration (Queen Mary Studies in International Law)* (Brill/Nijhoff 2015).

¹³⁸ ILC, ‘Report of the International Law Commission on the Work of its 58th Session’ (1 May - 9 June and 3 July - 11 August 2006) UN Doc A/61/10, 413-16; ILC, ‘Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (29 July 2005) UN Doc A/CN.4/L.676.

¹³⁹ Christian Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’ (1999) 281 RCADI 21, 63.

¹⁴⁰ Natalia Ochoa-Ruiz and Esther Salamanca-Aguado, ‘Exploring the Limits of International Law Relating to the Use of Force in Self-Defence’ (2005) 16 EJIL 499, 509.

¹⁴¹ See Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 ICLQ 279, 280.

¹⁴² ILC, ‘Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (29 July 2005) UN Doc A/CN.4/L.676, 27 (original emphasis).

Similarly, the ECtHR summarised the theory of systemic integration as follows:

[T]he Convention has to be interpreted in the light of the rules set out in the Vienna Convention [...] and [...] Article 31 § 3 (c) [...] indicates that account is to be taken of ‘any relevant rules of international law applicable in the relations between the parties’. The Convention [...] cannot be interpreted in a vacuum. The Court must be mindful of the Convention’s special character as a human rights treaty, and it must also take the relevant rules of international law into account [...] The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part [...].¹⁴³

The question that comes next is what exactly is meant by ‘rules of international law’ and whether the other applicable international law is that in force at the time the treaty was framed or at the time when the treaty is applied. With regard to the latter, since the textual analysis of article 31(3)(c) reveals that the subparagraph in question does not contain temporal provision, it is possible to argue that any rule of international law is potentially applicable irrespective of the time of its conclusion.¹⁴⁴ This is indeed what the ILC called ‘inter-temporality’: meaning of a treaty provision may be affected by subsequent developments in, *inter alia*, customary law and general principles of law.¹⁴⁵ Moreover, article 31(3)(c) is located in the same subparagraph as articles 31(3)(a) and 31(3)(b), both being of evolutionary character by virtue of their qualifier ‘subsequent’. Ultimately, the general requirement to interpret treaty in good faith may require evolutionary approach. It can thus be logically coherent to suggest that also any *subsequent* rule of international law is potentially applicable.¹⁴⁶

Turning back to the first question, namely what are the rules of international law for the purposes of article 31(3)(c) VCLT, McLachlan observes that the formulation ‘rules of international law’ may refer to all the sources of international law, including other treaties, custom and general

¹⁴³ *Al-Adsani v the United Kingdom* (GC) ECHR 2001-XI 761, para 55. See also *Fogarty v the United Kingdom* ECHR 2001-XI 762, para 35; *McElhinney v Ireland* ECHR 2001-XI 763, para 36.

¹⁴⁴ Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 ICLQ 279, 291. This position is now dominant in contemporary literature. See eg Ulf Linderfalk, *On the Interpretation of Treaties* (Springer 2010) 178.

¹⁴⁵ ILC, ‘Report of the International Law Commission on the Work of its 58th Session’ (1 May - 9 June and 3 July - 11 August 2006) UN Doc A/61/10, para 22. See also Erik Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014) ch 4.

¹⁴⁶ Sondre Torp Helmersen, ‘Evolutive Interpretation: Legality, Semantics and Distinctions’ (2013) 6 Eur J Leg Stud 127, 147. But see Malgosia Fitzmaurice, ‘Interpretation of Human Rights Treaties’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 765 (Claiming that article 31(3)(c) ‘allows reference only to provisions which are binding on the parties to a particular dispute [...] On this basis, reference to [...] the provisions of treaties that are not yet in force, would be deemed to fall outside the provisions of Article 31(3)(c)’).

principles.¹⁴⁷ Illustratively, in as early as 1975, the ECtHR identified ‘general principles of law recognized by civilized nations’ as relevant to the interpretation of the term ‘civil rights’ in article 6 ECHR:

Article 31 para. 3 (c) of the Vienna Convention indicates that account is to be taken, together with the context, of ‘any relevant rules of international law applicable in the relations between the parties’. Among those rules are general principles of law and especially ‘general principles of law recognized by civilized nations’ (Article 38 para. 1(c) of the Statue of the International Court of Justice) [...]

The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally ‘recognized’ fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 (art. 6-1) must be read in the light of these principles.¹⁴⁸

McLachlan notes, however, that the reference must be to rules of law, to the exclusion of broader principles or considerations.¹⁴⁹ It follows that soft law seems to automatically fall out of the definition. Be that as it may, since the doctrine of evolutive interpretation is conceptually independent from article 31(3)(c), ‘the range of relevant arguments to determine the evolution of an evolving term will often be much broader than just the “rules of international law” that article 31(3)(c) mentions’.¹⁵⁰ It means that rules that are not formally binding can also affect dynamics of the interpretation. This is evidenced by the practice of the ECtHR, which has referred to non-binding instruments of the CoE,¹⁵¹ UNGA resolutions,¹⁵² UNSC resolutions,¹⁵³ guidelines and conclusions published by the UN High Commissioner on Refugees¹⁵⁴ and the

¹⁴⁷ Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 ICLQ 279, 290; ILC, ‘Report of the International Law Commission on the Work of its 58th Session’ (1 May - 9 June and 3 July - 11 August 2006) UN Doc A/61/10, para 18 (‘Article 31(3)(c) deals with the case where material sources external to the treaty are relevant in its interpretation. These may include other treaties, customary rules or general principles of law’). The same view is expressed by Ulf Linderfalk, *On the Interpretation of Treaties* (Springer 2010) 177-78.

¹⁴⁸ *Older v the United Kingdom* (1975) Series A no 18, para 35. See also Vassilis P Tzevelekos, ‘The Use of Article 31(3)(c) of the VCLT in the Case-Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of the Teleology of Human Rights? Between Evolution and Systemic Integration’ (2009) 31 Mich J Int’l L 621.

¹⁴⁹ Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 ICLQ 279, 290. The same position is taken by Malgosia Fitzmaurice, ‘Interpretation of Human Rights Treaties’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 765.

¹⁵⁰ Sondre Torp Helmersen, ‘Evolutive Interpretation: Legality, Semantics and Distinctions’ (2013) 6 Eur J Leg Stud 127, 147.

¹⁵¹ *Demir and Baykara v Turkey* (2008) 48 EHRR 1345, paras 74-75.

¹⁵² *Al-Adsani v United Kingdom* (GC) ECHR 2001-XI 761, para 60.

¹⁵³ *Loizidou v Turkey* ECHR 1996-VI 2231, para 44.

¹⁵⁴ *Saadi v United Kingdom* App no 13229/03 (ECtHR (GC) 29 January 2008) para 65.

(then) non-binding EU Charter of Fundamental Rights¹⁵⁵ for the purpose of interpreting the ECHR. As the Court explained, ‘it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned.’ It further maintained that ‘[i]t will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies’.¹⁵⁶ Similarly, the ECJ invoked the ILC Articles on State Responsibility to facilitate the interpretation of the Montreal Convention.¹⁵⁷ In the same vein, the IACtHR cited several reports, recommendations and other soft law instruments to prove that there was an ‘international tendency’ to avoid the recruitment of child soldiers.¹⁵⁸ On the other hand, soft law can be considered ‘practice’ in terms of article 31(3)(b) VCLT, particularly in light of changes within the doctrine of customary international law whereby verbal state practice can in itself form custom.¹⁵⁹ In conclusion, evolutive interpretation of treaties implies that apart from the treaty text to be interpreted against the backdrop of the treaty’s object and purpose and overall context, a recourse is to be made to general international law ranging from hard rules to softer commitments existing at the moment of the treaty application.

That said, article 31(3)(c) provides a solid legal ground for cross-fertilisation between various human rights systems and regimes. In other words, regional interpretative practices can, and in fact should, be utilised to ensure that the rights enlisted in the ICCPR are guaranteed the most effective protection. The ECtHR has developed the most sophisticated conceptual tools and techniques to ensure that human rights provided in the ECHR are ‘practical and effective, not ‘theoretical and illusory’. These include, *inter alia*, the status as ‘living instrument’ of the human rights conventions generally and the ECHR in particular and the principle of ‘common values’ or ‘commonly accepted standards’. In *Tyrer v United Kingdom*, the Court submitted that because the ECHR is a living instrument and must be interpreted in the light of present-day conditions, ‘the Court cannot but be influenced by the developments and commonly accepted standards [...]’.¹⁶⁰ Likewise, in *Scoppola v Italy*, the Court affirmed that ‘[s]ince the Convention is first and foremost a system for the protection of human rights, the Court must [...] have regard to the changing conditions [...] and [...] to any emerging consensus as to the standards to be

¹⁵⁵ *Christine Goodwin v United Kingdom* (GC) ECHR 2002-VI, para 100; *Sorensen and Rasmussen v Denmark* (GC) ECHR 2006-I, para 72; *Eskelinen et al v Finland* App no 63235/00 (ECtHR (GC) 19 April 2007) para 60.

¹⁵⁶ *Demir and Baykara v Turkey* (2008) 48 EHRR 1345, para 86.

¹⁵⁷ Case C-63/09 *Axel Walz v Clickair SA* [2010] ECR I-04239, para 27.

¹⁵⁸ *Case of Vargas-Areco v Paraguay* (IACtHR, 26 September 2006) Series C no 155, para 122.

¹⁵⁹ See section 4.2.2.

¹⁶⁰ *Tyrer v United Kingdom* (1978) 2 EHRR 1, para 31.

achieved'.¹⁶¹ It further stated that '[i]t is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement'.¹⁶² There is now a rich case law in which the ECtHR makes use of these techniques.¹⁶³

The jurisprudence of the Inter-American Court evidences a similar approach, or what the Court designates '*pro homine*' approach — a technique that calls for reading guarantees and limitations in favour of the individual.¹⁶⁴ In its advisory opinion on *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, the IACtHR asserted that human rights law cannot be rendered static through reliance on the original intent of the drafters.¹⁶⁵ In the *Mapiripan Massacre* case, the Court explicitly referred to the case law of the ECtHR and held that 'human rights treaties are live instruments, whose interpretation must go hand in hand with evolving times and current living conditions'.¹⁶⁶ The Court submitted that such interpretation is consistent with the VCLT.¹⁶⁷

Whilst the concept of dynamic interpretation of treaties does not feature in the case law of the UN human rights bodies as distinctively as in regional human rights systems, there is, nonetheless, a trend to rely on the concepts of 'living instrument' and an emerging consensus of an 'increasing number of states' to interpret human rights provisions according to contemporary standards.¹⁶⁸ Illustratively, in *Judge v Canada*, the HRC submitted that the

¹⁶¹ *Scoppola v Italy* App no 10249/03 (ECtHR (GC) 17 September 2009) para 104.

¹⁶² *ibid.*

¹⁶³ See eg *Soering v the United Kingdom* (1989) Series A no 161, para 102; *Vo v France* [GC] (2005) 40 EHRR 12, para 82; *Mamatkulov and Askarov v Turkey* [GC] (2005) 41 EHRR 494, para 121; *Demir and Baykara v Turkey* (2008) 48 EHRR 1345, paras 68, 85, 146; *Micallef v Malta* App no 17056/06 (ECtHR (GC) 15 October 2009) para 81. For a detailed overview of the application of the concept of 'living instrument' in the case law of the ECtHR, see Johannes Silvis, 'Human Rights as a Living Concept: Case-law Overview' <<http://www.ejtn.eu/About/Administrative-Law-Project2/Administrative-Law-Sub-Working-Group/Human-Rights-Seminar-2014/>> accessed 26 May 2017.

¹⁶⁴ Malgosia Fitzmaurice, 'Interpretation of Human Rights Treaties' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 765-66; Dinah Shelton, 'Inherent and Implied Powers of Regional Human Rights Tribunals' in Carla Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law* (Brill Nijhoff 2016) 488.

¹⁶⁵ OC-10/89 (1989) IACtHR Series A no 10, para 37.

¹⁶⁶ *Case of the 'Mapiripan Massacre' v Colombia* (IACtHR, 15 September 2005) Series C no 134, para 106.

¹⁶⁷ *ibid.*

¹⁶⁸ See *Judge v Canada* (1988) 8 Selected Decisions of the Human Rights Committee 85, para 10.3; *Choi and Yoon v Republic of Korea* (2007) 9 Selected Decisions of the Human Rights Committee 218, para 8.4; *Stephen Hagan v Australia* (2002) 1 Selected Decisions of the Committee on the Elimination of Racial Discrimination 75, para 7.3; *VXN and HN v Sweden* Communication nos 130/1999 and 131/1999 (Committee against Torture, 15 May 2000) para

ICCPR ‘should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions’.¹⁶⁹ In *Choi and Yoon v Republic of Korea*, the Committee, in order to justify the right to conscientious objection under article 18 ICCPR, relied on ‘relevant’ and ‘common’ practice of ‘an increasing number of states’ that have introduced alternative service.¹⁷⁰ Moreover, the Committee has been eager to refer to other international instruments, such as the UDHR, the CEDAW, the CERD, the Declaration on the Protection of All Persons against Enforced Disappearances, the Rome Statute of the International Criminal Court and the standards set by the ILO, to interpret a particular ICCPR right.¹⁷¹ This notwithstanding, it has generally refrained from quoting either the ECtHR or other regional human rights tribunals.

Noteworthy, some scholars have asserted that human rights adjudicative bodies do not follow the interpretative rules of the VCLT and should, thus, be dismissed as illegitimate. However, a consensus is emerging that these expansive interpretative approaches do in fact follow the rules of interpretation prescribed by the VCLT.¹⁷² In effect, they can be viewed as a sophisticated version of the general international law’s principle of systemic integration specifically designed for the human rights context. Moreover, human rights adjudicative bodies are moving towards a largely similar methodology in interpreting human rights treaties, in particular through their references to various widely-endorsed international documents containing human rights

7.3. See also CEDAW ‘General Recommendation No 25: Temporary Special Measures’ (2004) UN Doc HRI/Gen/1/Rev.7, 282, para 3.

¹⁶⁹ *Judge v Canada* (1988) 8 Selected Decisions of the Human Rights Committee 85, para 10.3.

¹⁷⁰ *Choi and Yoon v Republic of Korea* (2007) 9 Selected Decisions of the Human Rights Committee 218, para 8.4. See also *Jung et al v Republic of Korea* Comm nos 1593-1603/2007 (23 March 2010) UN Docs CCPR/C/98/D/1593-1603/2007, para 7.2.

¹⁷¹ *SWM Brooks v The Netherlands* Comm no 172/1984 (9 April 1987) UN Doc CCPR/C/29/D/172/1984, para 12.3; *Danning v the Netherlands* Comm no 180/1984 (9 April 1987) UN Doc CCPR/C/OP/2, para 12.3; *Zwaan-De-Vries v The Netherlands* (1984) 2 Selected Decisions of the Human Rights Committee 209, para 12.1; *Love et al v Australia* (2001) 8 Selected Decisions of the Human Rights Committee 232, para 8.2; *Sarma v Sri Lanka* (2003) 8 Selected Decisions of the Human Rights Committee 210, para 9.3; *Boucherf v Algeria* Comm no 1196/2003 (30 March 2006) UN Doc CCPR/C/86/D/1196/2003, para 9.2; *Sharma v Nepal* Comm no 1469/2006 (6 November 2008) UN Doc CCPR/C/94/D/1469/2006, para 7.4; *Maoudoui v Algeria* Comm no 1495/2006 (1 December 2008) UN Doc CCPR/C/94/D/1495/2006, para 7.2.

¹⁷² See eg Daniel Rietiker, ‘The Principle of “Effectiveness” in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law — No Need for the Concept of Treaty *Sui Generis*’ (2010) 79 Nord J Int’l L 245, 276; Lucas Lixinski, ‘Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law’ (2010) 21 EJIL 585, 603-04; George Letsas, ‘Strasbourg’s Interpretative Ethic: Lessons for the International Lawyer’ (2010) 21 EJIL 509, 532; Birgit Schlutter, ‘Aspects of Human Rights Interpretation by the UN Treaty Bodies’ in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012) 317; Malgosia Fitzmaurice, ‘Interpretation of Human Rights Treaties’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 769-770.

provisions, such as the UN Charter and the UDHR¹⁷³ as well as international conventions that have not yet become accepted by all states of the international community. It follows that reliance by the HRC on the interpretative techniques developed by regional human rights tribunals is not only fully in obedience to the VCLT and in line with general international practice but is also an essential condition of its authority and legitimacy.

It is not an easy task to determine, with even a partial degree of certainty, how evolutive interpretation of article 25 ICCPR would look like. Although the HRC recognised the pertinence of the concept of ‘living instrument’ to the Covenant’s provisions, it considered that evolutionary interpretation is applicable in exceptional circumstances involving the most fundamental rights, such as the right to life, and ‘in particular if there have been notable factual and legal developments and changes in international opinion in respect of the issue raised [death penalty in the present case]’.¹⁷⁴ Whether the right to democracy inscribed in article 25 ICCPR is of such a fundamental nature is open to discussion. Moreover, the limits of evolutive interpretation have also been underscored by the ECtHR, who made clear that albeit the ECHR must be interpreted in the light of present-day conditions, ‘the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate’.¹⁷⁵ Because the ICCPR was adopted during the Cold War, when the exact content of the notion of democracy was highly contested by bipolar powers, it is possible to claim that the term ‘democracy’ was deliberately omitted from article 25 to make sure that both one-party regimes and representative democracies were regarded as compatible with the Covenant. To claim that present-day conditions require the article to be interpreted as solely permitting liberal democracies is to bring to naught the original intent of the drafters.

Wrongly or rightly, reading the article in the light of modern ‘commonly accepted standards’, when such central concepts as ‘genuine elections’ and ‘free expression of the will of the electors’ have evolved to include, among others, genuine choice, level playing field, independent monitoring of the electoral process, full realisation of the freedom of speech, assembly and association, independent judicial review and political pluralism in general,¹⁷⁶

¹⁷³ Malgosia Fitzmaurice, ‘Interpretation of Human Rights Treaties’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 769-70. See also Simon Walker, ‘International Human Rights Law: Towards Pluralism or Harmony? The Opportunities and Challenges of Coexistence: The View from the UN Treaty Bodies’ in Carla Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law* (Brill Nijhoff 2016) 493.

¹⁷⁴ *Judge v Canada* (1988) 8 Selected Decisions of the Human Rights Committee 85, para 10.3.

¹⁷⁵ *Johnston and Others v Ireland* (1986) 9 EHRR 203, para 53.

¹⁷⁶ See eg Eric C Bjornlund, *Beyond Free and Fair: Monitoring Elections and Building Democracy* (John Hopkins UP 2004) ch 6; Guy S Goodwin-Gill, *Free and Fair Elections* (2nd edn, Inter-Parliamentary Union 2006) 134, 163. See also UNGA Res 43/157 (8 December 1988) UN Doc A/RES/43/157, paras 2, 3; *Bwalya v Zambia* (1988) 5 Selected Decisions of the Human Rights Committee 23, para 6.6; Inter-Parliamentary Council, Declaration on Criteria for Free

is inconceivable with the parallel assertion of the compatibility of one-party politics with the Covenant, since to claim otherwise is to rob article 25 of its meaning. It follows that whilst the right to democracy is not explicitly mentioned in the ICCPR, including its article 25, it is implied therein, or should be implied, to assure that article 25 serves its purpose. Such line of reasoning is discernible in the practice of the ECtHR, which in the *Golder* case read into the Convention the right of access to court, right not expressly envisaged therein, in order to ensure that the expressly-guaranteed rights (particularly the right to a fair trial) are effective.¹⁷⁷ Similarly, the principle of effectiveness has been used as a foundation for the development of other positive obligations under the ECHR to ensure the effectiveness of, *inter alia*, access to judicial remedies,¹⁷⁸ the right to legal assistances in criminal proceedings,¹⁷⁹ protection from disruptions caused by demonstrations and threats,¹⁸⁰ and securing proper investigation of crimes.¹⁸¹

By the same token, the African Commission in *SERAC v Nigeria* stated that, although the African Charter does not expressly guarantee the right to housing or the right to food, the combination of articles 14, 16 and 18(1) providing for the right to property, the right to health and the right to family protection respectively, forbids the wanton destruction of shelter or food supplies. Thus, the combined effect of the aforementioned articles ‘reads into the Charter a right to shelter or housing [...]’.¹⁸² Remarkably, the unenumerated-right approach (reading into the convention a right not expressly envisaged therein to secure effectiveness of an enumerated right) has been also endorsed by the HRC, who in its General Comment 22 observed that even though ‘[t]he Covenant does not explicitly refer to a right to conscientious objection [the right to refuse to perform military service] [...] the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief’.¹⁸³ Owing to this

and Fair Elections (26 March 1994) <<http://www.ipu.org/cnl-e/154-free.htm>> accessed 29 August 2016.

¹⁷⁷ *Case of Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975) para 36.

¹⁷⁸ *Airey v Ireland* (1979) Series A no 32.

¹⁷⁹ *Artico v Italy* (1980) Series A no 37.

¹⁸⁰ *Ozgur Gundem v Turkey* (2001) 31 EHRR 1082.

¹⁸¹ *McCann and others v United Kingdom* (1996) Series A no 324.

¹⁸² *Social and Economic Rights Action Center (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 60.

¹⁸³ UNHRC ‘General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)’ (1993) UN Doc CCPR/C/21/Rev.1/Add.4, para 11. See also *Westerman v The Netherlands* Comm no 682/1996 (3 November 1999) UN Doc CCPR/C/67/D/682/1996, para 9.3 (‘[T]he Committee in its General Comment has expressed the view that the right to conscientious objection to military service can be derived from article 18’); *Choi and Yoon v Republic of Korea* (2007) 9 Selected Decisions of the Human Rights Committee 218, para 8.3 (‘[W]hile the right to manifest one’s protected form of manifestation of religious beliefs does not as such imply the right to refuse all obligations imposed by law, it provides certain protection, consistent with article 18, paragraph 3 against being forced to act against genuinely-held religious belief’).

logic, it is clear that evolutive approach renders interpretation pursuant to the *travaux préparatoires* under article 32 VCLT less important if such interpretation obliterates the effective protection of the right in question. International consensus, either ‘emerging’ or already existing, plays a prominent role in assessing and reinforcing such expansive interpretation.

Ultimately, one of the fundamental conditions of the principle of effectiveness is coherence.¹⁸⁴ This means that the ICCPR must be interpreted in such a way as to promote both internal consistency between its various provisions as well as external consistency with general international law. This is reflected in the VCLT which states that ‘the context for the purpose of interpretation of a treaty’ comprises text, preamble and annexes (principle of ‘internal coherence’)¹⁸⁵ as well as posits that together with the context, the recourse is to be made to ‘any relevant rules of international law’ (principle of systemic integration).¹⁸⁶ The principle of internal coherence animates the ECtHR’s jurisprudence as the Court frequently refers to other Convention rights and freedoms as an inspiration for interpreting provisions lacking clarity. One of the most obvious examples is article 3 of Protocol 1 to the ECHR (P1-3) providing for the right to free elections. Since the textual formulation of the right is rather plain and unassertive, the Court in its jurisprudence made reference to other rights and freedoms under the ECHR to give the provision *effect utile*. As a result, the generic wording of P1-3 is now to be interpreted as recognising individual rights to vote and stand for election.¹⁸⁷ Moreover, the Court asserted that P1-3 taken in conjunction with other relevant provisions of the Convention, such as, for example, article 10 (freedom of expression) and 11 (freedom of association), implies democratic institutions.¹⁸⁸ In the context of the ICCPR, this would mean that article 25 should be interpreted in liaison with other ICCPR articles to maintain coherence and harmony of the Covenant’s text. This was also recognised by the ILC (albeit in the context of the compatibility of reservations with treaty’s object and purpose), which opined that ‘account shall be taken of the indivisibility, interdependence and interrelatedness of the rights set out in the treaty [...]’.¹⁸⁹ Because the utmost protection of such fundamental rights and freedoms as the freedom of expression, assembly and association, prohibition of discrimination and the right to self-determination is only conceivable in plural and tolerant society,

¹⁸⁴ Daniel Rietiker, ‘The Principle of “Effectiveness” in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law — No Need for the Concept of Treaty *Sui Generis*’ (2010) 79 Nord J Int’l L 245, 267.

¹⁸⁵ The term is from Rietiker. See *ibid*.

¹⁸⁶ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 33 (VCLT) arts 31(2) and 31(3)(c).

¹⁸⁷ See eg *Yumak and Sadak v Turkey* (2009) 48 EHRR 4, para 109 (i).

¹⁸⁸ *Case of Zdanoka v Latvia* App no 58278/00 (ECtHR (GC) 16 March 2006) para 115. See also *Hirst v United Kingdom* [GC] ECHR 2005-IX 681, paras 57-62; *Adamsons v Latvia* App no 3669/03 (ECtHR, 24 June 2008) para 111.

¹⁸⁹ ILC, ‘Report of the International Law Commission on the Work of Its 61st Session’ (4 May - 5 June and 6 July - 7 August 2009) UN Doc A/64/10, 223.

which came to be synonymous with ‘democratic society’, reading article 25 against the backdrop of the Covenant’s overall text assumes democratic form of government.

Turning to the principle of systemic integration, or what Rietiker called ‘the principle of “external coherence”’,¹⁹⁰ since the principle has been thoroughly examined above, it suffices to note here that taking into account the surrounding legal framework is not only an option that Court may or may not avail itself of, but a legal obligation, whose violation may contribute to the fragmentation of international law and, thus, constitute an *ultra vires* act. Judge Ziemele made this point starkly in her dissenting opinion in *Andrejeva v Latvia*:

[T]he Court cannot always avoid taking a position on complex matters and instead deal with issues in a narrow and isolated manner. The Court must not go against the general rule of interpretation as set forth in the Vienna Convention on the Law of Treaties, and thus act *ultra vires*. In international law this raises a somewhat new challenge as concerns the value of such judicial decisions. The Court should not contribute to the fragmentation of international law in the name of alleged human rights, nor should it readily take decisions that may undermine State-building since the enforcement of human rights still requires strong and democratic State institutions [...].¹⁹¹

The obligatory consulting of other relevant rules of international law has been also recognised by the ECtHR in *Demir and Baykara v Turkey*, in which the Court clearly stated that article 31(3)(c) VCLT constitutes a legally binding obligation: ‘The Court [...] can and must take into account elements of international law other than the Convention’.¹⁹² Since it has been established that ‘relevant rules of international law’ encompass all sources of international law, such as treaties, custom and general principles as well as soft instruments existing at the time of treaty application, these must be taken into account in the interpretation of treaty provisions, including article 25 ICCPR. Whilst the above-examined interpretative techniques by regional human rights tribunals have significantly assisted in delineating the scope and limits of the evolutionary interpretation of article 25 ICCPR, drawing support from other rules of international law in outlining and reinforcing legal underpinnings of the right to democracy is essential for the latter’s normative sustainability and legitimacy. In what follows, it will be examined whether international law contains any customary rule or general principle weighing in favour of democratic entitlement. Further, the legal significance of soft law instruments shall be revisited, if not on their own, then as supplementary indicators of

¹⁹⁰ Daniel Rietiker, ‘The Principle of “Effectiveness” in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law — No Need for the Concept of Treaty *Sui Generis*’ (2010) 79 Nord J Int’l L 245, 271.

¹⁹¹ *Andrejeva v Latvia* App no 55707/00 (ECtHR, 18 February 2009) para 41 (Partly dissenting opinion of Judge Ziemele).

¹⁹² *Demir and Baykara v Turkey* (2008) 48 EHRR 1345, para 85.

states' evolving understanding with respect to the provisions of the Covenant. Shall the inquiry result in affirmative, one may confidently claim that the prevailing interpretation of article 25 as a right to a mere genuine electoral process, without repercussions for the form of government at large, is in violation of article 31(3)(c) VCLT given its failure to take cognisance of an overall legal framework.

4.2. Democracy in Customary International Law

4.2.1. Traditional Custom

More and more states in the international community are democratic and establish appropriate monitoring mechanisms to ensure that norms on free and periodic elections as well as the right to effectively participate in the political life of one's country are complied with. Against this backdrop, it is relevant to speculate whether oral commitments to establish and maintain democratic form of government and relevant state practice can be viewed as creating a customary norm of international law imposing obligation on states to commit themselves to introducing and protecting democracy.

Classical legal doctrine defines customary international law as a consistent practice among states that endures over a certain period of time and is viewed by states as legally mandated (a belief of being legally bound is commonly referred to as *opinio juris*, a shortened expression for *opinio juris sive necessitates*).¹⁹³ The *North Sea Continental Shelf* case serves as a *locus classicus* of this approach to custom:

[N]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.¹⁹⁴

A newly established customary norm is binding for all unless state opts out as a 'persistent objector'. In other words, a state that persistently objects to a newly emerging norm of customary international law during the formation of that norm is exempt from the norm once it crystallises into law. Needless to mention, this orthodox scheme succinctly reflects the consensual nature of the Westphalian state-centred order because any norm of international law can only bind a state that has consented to be bound by it. Since it is more difficult

¹⁹³ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute) art 38(i)(b). See also Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 6.

¹⁹⁴ *North Sea Continental Shelf Cases (Federal Republic of Germany v Netherlands; Federal Republic of Germany v Denmark)* (Merits) [1969] ICJ Rep 3, 44, para 77.

to establish the existence of *opinio juris*, it comes with no surprise that traditional doctrine attaches greater weight to state practice, which is now understood to consist of physical acts of individual states as well as statements and inaction.¹⁹⁵ These acts can acquire a variety of forms, including

[D]iplomatic correspondence, policy statements, press releases, the opinions of government legal advisers, official manuals on legal questions (eg manuals of military law), executive decisions and practices, orders to military forces (eg rules of engagement), comments by governments on ILC drafts and corresponding commentaries, legislation, international and national judicial decisions, recitals in treaties and other international instruments (especially when in ‘all States’ form), an extensive pattern of treaties in the same terms, the *practice of international organs*, and resolutions relating to legal questions in UN organs, notably the General Assembly.¹⁹⁶

Nowadays, the predominant part of inter-state cooperation occurs through international organisations, including in the area of democracy promotion. The UN engagement in the election (including plebiscites and referenda) monitoring missions since the 1950s is a good example of this form of state practice. Albeit its first missions were largely about the realisation of the right to self-determination of the inhabitants of trust and non-self-governing territories (the first one taking place in 1956 in British Togoland, the last one — in 1992 in Palau), they gradually evolved into large-scale election monitoring missions in sovereign countries in transition to democracy. The most prominent examples of such ‘second-generation’ operations include Namibia (previously South West Africa), Nicaragua (ONUVEN), Haiti (ONUVEH), Angola, Cambodia, El Salvador and Mozambique. The main objective of these missions was to ensure the transition to democracy from one or another form of authoritarian rule.¹⁹⁷ In 1990, the UNGA established the Unit for the Promotion of Democracy (UPD) in order to assist states in maintaining and strengthening their political institutions and democratic processes. The UPD holds observer missions and provides technical assistance to legislatures and electoral institutions. In 1992, the Electoral Assistance Division was created with the aim to serve as the focal point for electoral

¹⁹⁵ Conventional legal doctrine, or a so-called narrow approach, conceives only of physical state acts as amounting to practice. See Anthony D’Amato, *The Concept of Custom in International Law* (Cornell UP 1971) 88. A more recent, flexible approach looks to a wider range of materials, including what states say and what they omit from doing (acquiescence). See Michael Akehurst, ‘Custom as a Source of International Law’ (1975) 47 Brit YBIL 1, 3; Michael Wood, ‘State Practice’ in Rudiger Wolfram (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2014) para 6.

¹⁹⁶ James Crawford (ed), *Brownlie’s Principles of Public International Law* (8th edn, OUP 2012) 24 (emphasis added).

¹⁹⁷ See Yves Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections* (Martinus Nijhoff 1994) 120-49; Gregory Fox, ‘The Right to Political Participation in International Law’ in Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (CUP 2000) 73-75.

matters.¹⁹⁸ The main objectives of the electoral assistance are to ensure that elections are organised according to internationally recognised criteria established in international and regional human rights instruments and to assist states in building their institutional capacity in order to effectuate subsequent free and fair electoral campaign.

The monitoring of elections has also been taken up by regional organisations, including the OAS, the Commonwealth and the CoE as well as NGOs, such as the US National Endowment for Democracy, the Council of Freely Elected Heads of Government, the International Human Rights Law Group, the International Federation of Human Rights, Freedom House, the International Foundation for Electoral Systems and many others.¹⁹⁹ Whereas the OAS has been especially active in monitoring elections in fragile democracies of Latin America, such as, e.g., Surinam, El Salvador, Paraguay, Panama and Peru, the Commonwealth has committed itself to supporting former British colonies in their transition to democracy and has been particularly active in Africa, Asia, British Guiana and Gibraltar. In Europe, the leading role of democracy promotion has been taken by the CoE, which since its creation in 1949 has assumed both advisory and operational roles in the field of democracy-building and monitoring by, among others, aiding in defeating fascist-nazi and Marxism-Leninism ideologies and subsequently by observing national elections in Central and Eastern Europe.²⁰⁰ Ultimately, NGOs have monitored elections in dozens of countries. Their independent status has allowed them to intervene more rapidly, to be more outspoken and, if needed, more critical than inter-governmental organisations and government representatives.²⁰¹ It is essential to note that host states turned out to be very cooperative throughout observer missions and the number of requests for election monitoring has steadily increased. Furthermore, because the election standards mirror the text of human rights instruments and pronouncements of the Human Rights Committee and other human rights bodies, the standards can be regarded as evidence of the 'ordinary meaning' of the treaty terms concerning democratic participation.²⁰² It may also be argued that election monitoring missions constitute 'subsequent practice' for the purposes of interpretation of human rights treaties, including article 25 ICCPR.²⁰³ Moreover, there seem to be no persistent objections to such objective criteria of evaluation of compliance with human rights provisions, as the occasional resistance to monitoring missions does not emanate from ideological

¹⁹⁸ UNGA Res 46/137 (17 December 1991) UN Doc A/RES/46/137.

¹⁹⁹ Yves Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections* (Martinus Nijhoff 1994) 222-23.

²⁰⁰ *ibid.*

²⁰¹ *ibid.* 14.

²⁰² Gregory Fox, 'The Right to Political Participation in International Law' (1992) 17 Yale J Int'l L 539, 588-90.

²⁰³ But see Brad Roth, *Governmental Illegitimacy of International Law* (OUP 2000) 342 (Denying that the practice of the observer missions can qualify as 'subsequent practice' for the purposes of article 31(3)(b) VCLT).

opposition to the validity of criteria used, but rather from the fear of being constrained in the attempts to rig the election results.

Whether holding of, and participation in, election monitoring missions qualifies as state practice occasioning the emergence of a customary norm to install and maintain democratic form of government is still unclear. First, this practice solely displays the commitment to secure the right to free and fair elections, with the right to democracy assuming much broader dimensions. Second, election monitoring is only widespread in the Western hemisphere to the exclusion of the big parts of Asia. Third, it is too premature to claim that states view these observer practices as legally mandatory. The practice of election monitoring is perceived more as an exception designed to end civil war or regional conflict and/or to increase political legitimacy following turbulent domestic political climate and less as a manifestation of an adherence to the universal right to democracy. Forth, the relationship between monitoring practice and human rights instruments is rather theoretical than formal since article 25-based participatory rights have not explicitly formed the basis for any monitoring mission and the mission reports do not directly cite human rights instruments. On top of that, no regional or global human rights treaty provides for election monitoring as an enforcement mechanism.²⁰⁴

Another example of state practice relevant for the ascertainment of the existence of a customary norm obligating states to be democratic is membership conditionality in the statutes of a number of regional organisations, including the European Union (EU), OAS, African Union (AU), Association of South-East Asian Nations (ASEAN), North Atlantic Treaty Organisation (NATO), CoE, OSCE and others, which commit themselves, at least formally, to the principle of democracy. The cases of rejection of membership rights to undemocratic states or their restriction serves as a vital constituent part of the pro-democratic argument.²⁰⁵ To illustrate, membership in NATO is preconditioned by the commitment to democracy. Whilst the text of the North Atlantic Treaty does not include democracy as a membership requirement,²⁰⁶ the material conditions of membership were elaborated in the *Study on NATO Enlargement* in 1995, which holds that in order to become a member of the Organisation, willing states must demonstrate that they have ‘a functioning democratic political system based on a market economy’.²⁰⁷

²⁰⁴ Gregory Fox, ‘The Right to Political Participation in International Law’ in Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (CUP 2000) 85.

²⁰⁵ For a detailed analysis of this dimension of state pro-democracy practice, see ch 5.

²⁰⁶ The North Atlantic Treaty (adopted 4 April 1949, entered into force 24 August 1949) 34 UNTS 243, art 10 (‘The Parties may, by unanimous agreement, invite any other European State in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic area to accede to this Treaty. Any State so invited may become a Party to the Treaty by depositing its instrument of accession with the Government of the United States of America. The Government of the United States of America will inform each of the Parties of the deposit of each such instrument of accession’).

²⁰⁷ NATO, ‘Study on NATO Enlargement’ (3 September 1995) <http://www.nato.int/cps/en/natolive/topics_49212.htm> accessed 20 October 2015. For a more

One can also mention democratic conditionality in development policies as well as state creation and recognition practices as relevant instances of state material practice for the purposes of ascertainment of the objective element of the customary democratic norm. As to the former, in the course of the last decades, most major donors practiced democratic conditionality in the delivery of development assistance programs, with the case of the EU being of particular interest given its rigorous approach and the language of legal obligations.²⁰⁸ In short, the EU adopted a policy of including human rights and democracy clauses into its bilateral trade and cooperation agreements with third countries. More recent documents reveal that serious and persistent breaches of human rights as well as democratic interruptions are regarded as material breaches, as the term is understood in article 60 VCLT, which, in turn, enable the EU to suspend compliance with its treaty obligations.²⁰⁹ On a global scale, the practice of international financial organisations is worth a mention. Since the 1990s, the countries can only obtain financial support from the International Monetary Fund (IMF) and the World Bank provided that they 'govern well'. Traditionally, 'good governance' was defined by reference to sound macro-economic performance. However, it became soon clear that economic development and the rule of law go hand in hand. As a result, both the IMF and the World Bank supplemented their lending requirements with political conditions, such as respect for human rights and democratic governance.²¹⁰

The practice of creation of new states has also been marked by the 'democratic bias'. Entities that attained statehood in the last decades with the support or the involvement of the international community have been impelled to introduce democratic institutions. Similarly, most cases of the international administrations of territory culminated in the creation of democratic states, the most prominent examples being East Timor (UNTAET) and Kosovo (UNMIK), albeit the latter's status as state is not yet finally resolved.²¹¹ Other

detailed exposition, see Alison Duxbury, *The Participation of States in International Organizations: The Role of Human Rights and Democracy* (CUP 2011) 130ff.

²⁰⁸ Ronald Rich, 'Bringing Democracy into International Law' (2001) 12 *Journal of Democracy* 20, 29.

²⁰⁹ *ibid.* See also Stephen Haggard and Steven B Webb, *Voting for Reform: Democracy, Political Liberalization and Economic Adjustment* (OUP 1994); Barbara Brandtner and Allan Rosas, 'Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice' (1998) 9 *EJIL* 468, 473-77.

²¹⁰ See World Bank, *Governance and Development* (The World Bank 1992); World Bank, *Governance. The World Bank's Experience* (The World Bank 1994); World Bank, *Helping Countries Combat Corruption. The Role of the World Bank* (The World Bank 1997); World Bank, *Development and Human Rights. The Role of the World Bank*, (The World Bank 1998); Jan Wouters and Cedric Ryngaert, 'Good Governance: Lessons from International Organizations' in Deirdre M Curtin and Ramses A Wessel (eds), *Good Governance in the European Union. Lessons from National and International Law* (Intersentia 2004).

²¹¹ Jean d'Aspremont, 'The Rise and Fall of Democratic Governance in International Law' in James Crawford and Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law* (Hart Publishing 2012) 61. See also Jean d'Aspremont, 'La création internationale d'États démocratiques' (2005) 109 *RGDIP* 889; Jean d'Aspremont, 'Post-Conflict

examples where the UN invoked its Chapter VII powers to reconstruct post-conflict societies along democratic lines include, among others, the UN Transitional Assistance Group (UNTAG) deployed in Namibia and UN's Transitional Authority in Cambodia (UNTAC).²¹² Further, democratisation has not left the practices of recognition of new states and governments untouched either. The case of the Yugoslav crisis is the most cited example. To make a long story short, following the Yugoslav war, the EC Member States established the Arbitration Commission (or the Banditer Commission) and passed two documents outlining recognition policy in relation to the new states that emerged in the territory of the SFRY (and the Soviet Union): the EC Guidelines²¹³ and the EC Declaration on Yugoslavia.²¹⁴ Pursuant to the EC Guidelines, states must 'have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations'.²¹⁵ Whilst the document does not spell out in any more detail what is meant by 'democratic', it contains a direct reference to the Charter of Paris, which stipulates that '[d]emocratic government is based on the will of the people, expressed regularly through free and fair elections'. It further states that '[d]emocracy has as its foundation respect for the human person and the rule of law. Democracy is the best safeguard of freedom of expression of all groups of society, and equality of opportunity for each person'.²¹⁶ The EC Declaration supplemented the EC Guidelines with requirements specifically addressed to the Yugoslav situation.

Last but not least, the recent SC-endorsed practice of the enforcement action against 'rogue' and 'failed' states aimed at forcible imposition of democratic institutions too speaks in favour of maturing of a democratic customary norm.²¹⁷ The most cited cases of forcible democracy defence and democracy-building under the aegis of the SC include Haiti (1994), Sierra Leone (1997), Kosovo (1999) and Libya (2011). As one prominent scholar pointedly observed '[l]es États non démocratique ne semblent plus pouvoir se "réfugier" derrière la règle de non-intervention dans les affaires intérieures

Administrations as Democracy-Building Instruments' (2008) 9 Chi J Int'l L 1; Jure Vidmar, *Democratic Statehood in International Law* (Hart Publishing 2013) 116-24.

²¹² For more on this, see Russell Buchan, *International Law and the Construction of the Liberal Peace* (Hart Publishing 2013) 154-61.

²¹³ EC Guidelines on Recognition of New States in Eastern Europe and in the Soviet Union (16 December 1991) reprinted in Snezana Trifunovska, *Yugoslavia through Documents: From its Creation to its Dissolution* (Martinus Nijhoff 1994) 472.

²¹⁴ EC Declaration on Yugoslavia (16 December 1991) reprinted in Snezana Trifunovska, *Yugoslavia through Documents: From its Creation to its Dissolution* (Martinus Nijhoff 1994) 474.

²¹⁵ EC Guidelines on Recognition of New States in Eastern Europe and in the Soviet Union (16 December 1991) para 2.

²¹⁶ OSCE, The Charter of Paris for a New Europe (21 November 1990) 3 <<https://www.oscepa.org/documents/all-documents/documents-1/historical-documents-1/673-1990-charter-of-paris-for-a-new-europe/file>> accessed 30 August 2016.

²¹⁷ For a more detailed overview, see section 5.1.

quand l'objet de l'intervention est [...] la démocratisation de leur régime'.²¹⁸ While the practice of adopting forcible measures against non-democracies is far from consistent and is at loggerheads with the principles of sovereignty and non-intervention, it can find psychological support in the Declaration on Principles of International Law concerning Friendly Relations, which is now commonly recognised as customary international law. The Declaration explicitly makes the territorial integrity of a state contingent on its possession of a representative government:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.²¹⁹

Thus, whilst the preceding analysis makes clear that the democracy promotion agenda is certainly discernible in the practice of states, either on their own or through the venues of international organisations, there is no consensus yet within international scholarly circles whether this practice is consistent and durable enough to result in the establishment of a customary norm of democracy. There are several points to consider. First, it is not clear whether state actions in support of democracy have been accompanied by a belief that they were following a legal norm (*opinio juris*). Second, if the right to democracy crystallised into the norm of customary international law, then the violation of the norm in question (non-application of democratic governance or democratic disruption) would be seen as a violation of international law and engage state responsibility. This is certainly not the case.²²⁰ The reality is that very often there appears to be a consistent state practice of *violating* the democratic entitlement. This is mostly visible in the rise of the modern semi-authoritarian regimes, rhetorically committed to democracy and in reality exempting their citizens from a real access to the political processes of decision-making, not to mention the hard-core authoritarian states as China and North Korea. Third, powerful states demonstrating no commitment to

²¹⁸ Jean d'Aspremont, *L'État non démocratique en droit international* (Pedone 2008) 95. (Non-democratic regimes do not seem any longer be able to find a refuge behind the rule of non-intervention into their domestic affairs when the object of the intervention is the democratisation of their regime) (author's translation).

²¹⁹ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970).

²²⁰ Sean D Murphy, 'Democratic Legitimacy and the Recognition of States and Governments' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 128; Steven Wheatly, 'Democracy in International Law: A European Perspective' (2002) 51 ICLQ 225, 233; Khalifa A Alfadhel, *The Right to Democracy in International Law* (Routledge 2017) 16.

democracy whatsoever face no serious objection on the part of the international community.²²¹ Forth, the doctrine of pro-democratic intervention is not supported by consistent state practice and remains a controversial issue in international law.²²² Finally, the scope of the democratic norm, that is whether democracy is synonymous with elections or whether it includes certain substantive virtues, is not evident from state practice. It follows that under the traditional approach to custom, democracy does not seem to reach the level of a customary norm.

4.2.2. Modern Custom

As constitutionalisation of international law envisages a shift of focus from individual state will to global consensus, it comes as no surprise that the traditional definition of custom comes under ever more strain. More pointedly put, state will still remains an important formative and validating element of international lawmaking. However, the process of identification of such will increasingly relies on the latter's accordance with international consensus embodied in a set of fundamental constitutional principles, to which the state in question has previously consented, either explicitly or implicitly. A novel definition of customary international law advocated by Lepard incorporates this post-Westphalian imperative. He submits that

A customary international norm arises when states generally believe that it is desirable now or in the near future to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain conduct. This belief constitutes *opinio juris*, and it is sufficient to create a customary law norm. It is not necessary in every case to satisfy a separate 'consistent state practice' requirement. Rather, state practice can serve as one source of evidence that states believe that a particular legal principle or rule is desirable now or in the future.²²³

There are two points to be stressed. First, Legard asserts that for a customary norm to arise, it is enough for *opinio juris* to reflect a belief by states that a practice *should* be required instead of a traditional doctrinal view that it is *already* required. In this way, global constitutional principles more easily find their way to the subjective element of custom, because all that is necessary is that the majority of states solely believe in the importance of these principles. Second, state practice is relevant merely to the extent it proves the evidence of

²²¹ Jean d'Aspremont, 'The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks' (2011) 22 EJIL 549, 551.

²²² Michael Byers and Simon Chesterman, "'You, the People': Pro-Democratic Intervention in International Law' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 259.

²²³ Brian D Lepard, *Customary International Law: A New Theory with Practical Applications* (CUP 2010) 8.

such a belief. Moreover, Lepard insists that in ascertaining state beliefs it is imperative to take cognisance of certain ‘fundamental ethical principles’ (in other words, constitutional principles) recognised in extant international law.²²⁴ These include principles of human dignity and human rights, state accountability, limited state sovereignty, democracy etc. Similarly, Bradley asserted that the traditional approach to custom’s subjective element should be modified along these lines: a new customary norm ‘can be recognised when it is evident — from state practices, statements, and other evidence — that the rule is something that the relevant community of states *wishes to have as a binding norm going forward* and that it is socially and morally desirable’.²²⁵ The constitutional transformation of the doctrine of custom is also neatly captured by Klabbers who notes that ‘[c]ustom is no longer what states actually do, but partly based on what they say to do, even if they act differently’.²²⁶ This is what Roberts called ‘modern custom’ (also known as ‘instant custom’²²⁷ or *coutume sage*²²⁸) – an approach to customary international law that significantly discounts the requirement of general and consistent state practice and instead focuses primarily on *opinio juris*, which is usually determined from verbal statements.²²⁹ By the same token, Kirgis suggested to put customary law on a ‘sliding scale’ by placing less emphasis on what states actually do, the more generally accepted a norm appears to be: ‘The more destabilizing or morally distasteful the activity — for example [...] the deprivation of fundamental human rights — the more readily international decisions makers will substitute one element for the other, provided that the asserted restrictive rule seems reasonable’.²³⁰ More recently, Waters and Ryngaert asserted that ‘the more important the common interests of states or humanity are, the greater the weight that may be attached to *opinio juris* as opposed to state practice’.²³¹ Thus, in situations where global community interests are at stake, inconsistent state practice may be overlooked and greater premium may be placed on states’ statements and pronouncements, as an expression of belief in the importance of a certain norm to have binding legal effect.

In this connection, it is noteworthy to mention the ICJ’s dictum in *Military and Paramilitary Activities*. The Court paid lip service to the traditional

²²⁴ *ibid.*

²²⁵ Curtis A Bradley, ‘Customary International Law Adjudication as Common Law Adjudication’ in Curtis A Bradley (ed), *Custom’s Future: International Law in a Changing World* (CUP 2016) 56 (emphasis added).

²²⁶ Jan Klabbers, *International Law* (CUP 2013) 32.

²²⁷ Bin Cheng, ‘United Nations Resolutions on Outer Space: “Instant” International Customary Law?’ (1965) 5 *Indian J Int’l L* 23.

²²⁸ Rene-Jean Dupuy, ‘Coutume Sage et Coutume Sauvage’ in *La Communauté Internationale. Mélanges offerts à Charles Rousseau* (Pedone 1974).

²²⁹ Anthea E Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (2002) 95 *AJIL* 757, 758.

²³⁰ Frederic Kirgis, ‘Custom on a Sliding Scale’ (1987) 81 *AJIL* 146, 149.

²³¹ Jan Wouters and Cedric Ryngaert, ‘Impact on the Process of the Formation of Customary International Law’ in Menno T Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP 2009) 112.

approach to custom but identified the customary rule of non-use of force and non-intervention in UN General Assembly resolutions, stating that

[O]pinio juris may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions [...] The effect of consent to the text of such resolutions [...] may be understood as an acceptance of the validity of the rule or set of rules declared by themselves.²³²

The Court further asserted that the practice of states in the application of rules should not have been perfect but it was sufficient for the conduct of states to be consistent with such rules, and ‘that the instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule’.²³³ The Court, thus, gave more credit to the law-making qualities of UNGA resolutions and downgraded the importance of material practice as one of the two key elements constituting custom. The evidence of *opinio juris* and/or practice was identified in such resolutions and in their verbal acceptance by states: ‘General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*’.²³⁴ The method the Court applied was later on dubbed as ‘modern positivist method’.²³⁵ This novel approach of the ICJ to the ascertainment of customary norms is a logical attribute of its general tendency to lessen the investigation of the existence of the two elements forming customary law and to consider instead other evidence to determine the existence or content of a customary rule applicable to the case at hand, which is not, formally, the source of law.²³⁶

The trend to focus on *opinio juris* to the expense of longstanding and consistent state practice is also visible in the judicial practice of some international criminal tribunals. For instance, in the *Kupreskic* case, the International Criminal Tribunal for the Former Yugoslavia (ICTY) found that there was a customary law prohibition of reprisals against civilians, despite a scarcity of state practice.²³⁷ Earlier, in its 1995 dictum in *Tadic*, the ICTY had

²³² *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 188.

²³³ *ibid* para 186.

²³⁴ *ibid* para 70.

²³⁵ Jan Wouters and Cedric Ryngaert, ‘Impact on the Process of the Formation of Customary International Law’ in Menno T Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP 2009) 114.

²³⁶ Peter Tomka, ‘Custom and the International Court of Justice’ (2013) 12 LPICT 195, 202.

²³⁷ *Prosecutor v Kupreskic* (Judgment) ICTY-95-16-T (14 January 2000) para 527 (‘[The Martens] Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity or public

similarly broadened the scope of customary IHL of non-international armed conflicts based primarily on *opinio juris*.²³⁸ The same tendency to pay far more attention to *opinio juris* than to state practice has also been (empirically) documented with respect to other international and national courts²³⁹ as well as the International Committee of the Red Cross (ICRC).²⁴⁰ Thus, the modern approach to custom does not dispense wholesale with the traditional ‘state practice plus *opinio juris*’ approach. It rather represents a refinement of the conventional view shaped by judicial and practical experience.

There is now a rich collection of doctrinal claims and counterclaims on how to make custom a more workable concept applicable to the increasingly globalised and interconnected society of more than 190 states and even bigger number of non-state entities.²⁴¹ Critical voices warn against modern approach to customary international law as it arguably lacks legitimacy of state consent and is deficient on formalistic grounds.²⁴² The new theories, it is said, make it

conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law’).

²³⁸ *The Prosecutor v Dusko Tadic* (Jurisdiction) ICTY-94-1-AR72 (2 October 1995) 98, 119 (The Court maintained that in addition to replicating Common Article 3 and ‘the core of Additional Protocol II’, customary IHL proscribes certain means and tactics that are only prohibited in international conflicts). See also Monica Hakimi, ‘Custom’s Method and Process: Lessons from Humanitarian Law’ in Curtis A Bradley (ed), *Custom’s Future: International Law in a Changing World* (CUP 2016) 156-57 (Underscoring a trend in judicial decision making toward focusing on *opinio juris* rather than state practice).

²³⁹ For more on this, see Stephen J Choi and Mitu Gulati, ‘Customary International Law: How Do Courts Do It?’ in Curtis A Bradley (ed), *Custom’s Future: International Law in a Changing World* (CUP 2016) 125, 147.

²⁴⁰ Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (CUP 2005) (ICRC Study) xlviii (‘It appears that international courts and tribunals on occasion conclude that a rule of customary international law exists when the rule is a desirable one [...] for the protection of the human persons, provided that there is no important contrary *opinio juris*’); Daniel Bethlehem, ‘The Methodological Framework of the Study’ in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007) 13 (Arguing that the practice was all too often equivocal and scarce to support the claimed CIL norms); Elizabeth Wilmshurst, ‘Conclusions’ in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007) 402-03 (Concluding that the ICRC has ‘sometimes adopted an approach which is less conservative than it is claimed’ and on occasion ‘fairly relaxed’).

²⁴¹ See eg Bin Cheng, ‘Custom: The Future of General State Practice in a Divided World’ in Ronald MacDonald (ed), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Kluwer Academic Publishers 1986) 513; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1989) 79-106; Hiram E Chodosh, ‘Neither Treaty nor Custom: The Emergence of Declarative International Law’ (1991) 26 *Tex Int’l L J* 87; Lori Lyman Bruun, ‘Beyond the 1948 Convention — Emerging Principles of Genocide in Customary International Law’ (1993) 17 *Md J Int’l L & Trade* 193, 216-17; Jonathan Charney, ‘Universal International Law’ (1993) 87 *AJIL* 529, 543; Richard B Lillich, ‘The Growing Importance of Customary International Human Rights Law’ (1996) 25 *Ga J Int’l & Comp L* 1, 8; David Fidler, ‘Challenging the Classical Concept of Custom’ (1996) 39 *Germ YBIL* 199, 216-31.

²⁴² Robert Jennings, ‘Identification of International Law’ in Bin Cheng (ed), *International Law: Teaching and Practice* (Stevens 1982) 3, 5; Prosper Weil, ‘Towards Relative Normativity in

more difficult to distinguish legal norms (*lex lata*) from moral norms (*lex ferenda*) and thus allow ‘the law’ to mask moral or political agendas on the part of their protagonists. They result in what one prominent scholar called ‘fake custom’ — new norms are recognised as customary even though they constitute nothing more than wishful thinking.²⁴³ Other commentators have labelled these developments as ‘identity crisis’ of customary law since by de-emphasising the importance of state practice as one of the constituting elements of custom, one ends up by substituting it with *opinio juris*, with the latter being thereby counted twice.²⁴⁴ For other scholars, it is not that customary international is now in crisis but that some international lawyers, boldly relying on article 38 of the ICJ Statute, overstretch this concept so much that it is not custom at all. According to this view, one should, instead of thinking of international law within the framework of article 38, rely on other sources of international law, such as for instance UNGA resolutions, as autonomous categories²⁴⁵ that constitute a new form of lawmaking.²⁴⁶ The taproot of these observations is that the modern theories arguably stretch the concept of custom to a breaking point and thereby lead to uncertainty about the existence and content of particular norms of customary international law.

It may be argued that the aforementioned identical crisis of customary international law, or however it is called, is caused by the inadequacy of the traditional positivist framework to tackle current developments in the international legal system based, by and large, on common interest. With that in mind, it is difficult to imagine how the pursuance of common interest can be frustrated by the actions of a state, previously claiming adherence to global values and yet acting in different manner for the reasons of, say, changes in domestic political climate or some extraneous political considerations. In fact, many nondemocratic states do not openly deny the existence of democratic principles in international law and even claim that they are themselves in the process of transition to a fully-fledged democratic regime,²⁴⁷ even if their practice happens to be diametrically opposite. The post-Westphalia emergence of a sense of a belonging to the global international community and the attendant fear of political and moral fall-out incite even the most outright

International Law?’ (1983) 77 AJIL 413, 435; Van Hoof, *Rethinking the Sources of International Law* (Springer 1983) 86; Michael W Reisman, ‘The Cult of Custom in the Late 20th Century’ (1987) 17 Cal W Int’l L J 133; Anthony D’Amato, ‘Trashing Customary International Law’ (1987) 81 AJIL 101; Artur A Weisburd, ‘Customary International Law: The Problem of Treaties’ (1988) 21 Vand J Transnat’l L 1.

²⁴³ Fernando R Teson, ‘Fake Custom’ in Brian D Lepard (ed), *Reexamining Customary International Law* (CUP 2017) 86.

²⁴⁴ Bruno Simma and Philip Alston, ‘The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles’ (1989) 12 Aust YBIL 82, 88.

²⁴⁵ Onuma Yasuaki, ‘The ICJ: An Emperor Without Clothes? International Conflict Resolution, Article 38 of the ICJ Statute and the Sources of International Law’ in Ando Nisuke and others (eds), *Liber Amicorum Judge Shigeru Oda* (Vol 1, Kluwer Law International 2002) 209.

²⁴⁶ Patrick J Kelly, ‘Twilight of Customary International Law’ (2000) 40 Va J Int’l L 449, 486.

²⁴⁷ Jean d’Aspremont, ‘Responsibility for Coups d’État in International Law’ (2010) 18 Tul J Int’l & Comp L 451, 465.

transgressors to make clear in their verbal statements adherence to community values. In other words, states whose physical practice is in contradiction with the universally recognised standards and who deny such practice on factual grounds, do implicitly accept the standard involved. Ignoring such a powerful evidence of *opinio juris* simply because state practice is inconsistent, short or non-existent is erroneous, short-sighted and anachronistic. Moreover, if one accepts the view that the traditional element of consistent physical practice has no value of its own but is rather used as a proof of *opinio juris*, then to require existence of such practice even when *opinio juris* is reasonably clear is to show a poor analysis. One should also acknowledge the fact that with the increase of the number of states to nearly 200 nations it becomes virtually impossible to examine the vast array of evidence of state practice for each sovereign state. Hence, viewing state verbal practice as both evidence of *opinio juris* and actual practice may kill two birds with one stone.

In complement, considering the fact that only a handful of the most economically advanced and militarily powerful states can make their practice visible on the international plane, traditional doctrine of custom not only fails to secure legal equality between states and, thus, legitimacy of the international lawmaking process, but exacerbates even more the factual power and wealth variations between states.²⁴⁸ The process of the modern custom formation, on the other hand, resembles that of treaty-making as it is a conscious, egalitarian and deliberate process. Because it gives an equal voice to all participating parties, it makes international law, in words of Charney, truly ‘universal’.²⁴⁹ Indeed, as Alvarez submitted, both traditional custom and modern custom involve shortcuts, albeit of a different kind. While for traditional custom it is mostly *ratione personae* shortcut (the most interested and powerful states), modern custom is premised on *ratione materiae* shortcut (verbal practice).²⁵⁰ To say that the one is more legitimate than the other is to misunderstand the very process of customary law formation. In crude words, ‘[i]n taking individual instances of what is pathological behaviour among states — as a guide for the general conduct of states, opponents are guilty of the same

²⁴⁸ For a more detailed discussion of the inherent link between power and traditional customary law formation, see generally Michel Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (CUP 1999); Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007) 36-39 (Arguing that much of modern international law was shaped by the European colonial encounter with non-European civilisations, with the latter as the objects of reform); Patrick J Kelly, ‘Customary International Law in Historical Context: The Exercise of Power Without General Acceptance’ in Brian D Lepard (ed), *Reexamining Customary International Law* (CUP 2017) 47 (Claiming that the history of CIL ‘suggests that to a large degree publicists and powerful nations ignored inconvenient state practice and generated customary international law norms based on prior assumed values or perceived self-interest irrespective of the general acceptance of a norm’).

²⁴⁹ Jonathan Charney, ‘Universal International Law’ (1993) 87 AJIL 529.

²⁵⁰ Jose E Alvarez, *International Organisations as Lawmakers* (OUP 2005) 592. See also Jonathan Charney, ‘Universal International Law’ (1993) 87 AJIL 529, 538.

evidentiary sin of which they accuse proponents'.²⁵¹ Ultimately, because international law lacks a global legislative body, 'enlightened' community of states may search for other avenues for bringing international values into international law to further the legitimacy and effectiveness of the international public order. By doing so, they do not challenge the established lawmaking process as such but rather place changing degrees of importance on its constitutive elements, including the twin elements of custom.

It follows from the above-mentioned that in establishing the existence of a customary norm of the democratic entitlement one must look for the evidence of *opinio juris* rather than state practice and not only that of states but also non-state entities. Such an approach falls squarely within the confines of positivist orthodoxy as it is based on a universal consent and is responsive to the exigencies of modern realities without tapping into extra-legal penumbra. As regards universality, Wouters and Ryngaert submitted that modern custom is in a way even more positive than traditional custom, however counter-intuitive it may sound, as it pays even bigger credit to the notion of consent as is expressed in declarations and treaties with nearly universal participation, whereas traditional custom is mostly derived from the practice of a small number of prominent and privileged states.²⁵²

UNGA resolutions, inasmuch as they deal with the issues of general law and mirror the consensus of a large majority of states, are the first place to look at. As Cassese argues, the 'unique opportunity afforded by the UN for practically all members of the world to get together and exchange their views cannot fail to have had a strong impact on the emergence or reshaping of customary rules'.²⁵³ Since 1988, the UNGA annually placed the issue of democracy on its agenda. Up to 1994, it issued a set of resolutions entitled 'Enhancing the effectiveness of the principle of periodic and genuine elections'.²⁵⁴ Thereafter the title was changed to 'Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization'.²⁵⁵ One of the resolutions (adopted without a vote) states:

²⁵¹ Gunther Handl, 'Transboundary Impacts' in Daniel Bodansky, Jutta Brunnee and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007) 534.

²⁵² Jan Wouters and Cedric Ryngaert, 'Impact on the Process of the Formation of Customary International Law' in Menno T Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP 2009) 131.

²⁵³ Antonio Cassese, *International Law in a Divided World* (Clarendon Press 1986) 193.

²⁵⁴ UNGA Res 43/157 (8 December 1988) UN Doc A/RES/43/157; UNGA Res 44/146 (15 December 1989) UN Doc A/RES/44/146; UNGA Res 45/150 (18 December 1990) UN Doc A/RES/45/150; UNGA Res 46/137 (17 December 1991) UN Doc A/RES/46/137; UNGA Res 47/138 (18 December 1992) UN Doc A/RES/47/138; UNGA Res 48/131 (20 December 1993) UN Doc A/RES/48/131; UNGA Res 49/190 (23 December 1994) UN Doc A/RES/49/190.

²⁵⁵ UNGA Res 50/185 (22 December 1995) UN Doc A/RES/50/185; UNGA Res 52/129 (12 December 1997) UN Doc A/RES/52/129; UNGA Res 54/173 (17 December 1999) UN Doc A/RES/54/173; UNGA Res 56/159 (19 December 2001) UN Doc A/RES/56/159; UNGA Res 58/180 (22 December 2003) UN Doc A/RES/58/180; UNGA Res 60/162 (16 December 2005) UN Doc A/RES/60/162; UNGA Res 62/150 (18 December 2007) UN Doc A/RES/62/150;

[P]eriodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms.²⁵⁶

It is clear from the text of the resolution that effective enjoyment of human rights is dependent on democratic institutions. It further posits that ‘determining of the will of the people requires an electoral process which accommodates distinct alternatives’ and that ‘this process should provide an equal opportunity for all citizens to become candidates and put forward their political views, individually and in cooperation with others’.²⁵⁷ Thus, political pluralism is explicitly recognised as an essential element of ‘genuineness’ of the electoral process. Whilst in a parallel set of resolutions, the General Assembly emphasised the importance of the principles of national sovereignty and non-interference in states’ internal affairs,²⁵⁸ one may notice a gradual change of language in the title of these resolutions, from the strict and unqualified one to more attenuated. What is more, from 2005 the sovereignty concern was no more on the agenda of the General Assembly. In one of its most recent resolutions, the UNGA reaffirmed that ‘democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives’.²⁵⁹ It also reaffirmed that freely expressed will of the people is preconditioned on free participation of the political opposition by calling upon states to ensure ‘through legislation, institutions and mechanisms, the freedom to form democratic political parties that can participate in elections [...]’.²⁶⁰

Even more striking evidence of *opinio juris* in favour of the right to democracy was conveyed by then-Secretary-General Boutros-Ghali in his *Agenda for Democratisation*.²⁶¹ In this avant-garde document, he spoke for the right to democracy and its inviolability irrespective of the principle of non-

UNGA Res 64/155 (18 December 2009) UN Doc A/RES/64/155; UNGA Res 66/163 (19 December 2011) UN Doc A/RES/66/163.

²⁵⁶ UNGA Res 43/157 (8 December 1988) UN Doc A/RES/43/157, para 2.

²⁵⁷ *ibid* para 3.

²⁵⁸ UNGA Res 44/147 (15 December 1989) UN Doc A/RES/44/147; UNGA Res 45/151 (18 December 1990) UN Doc A/RES/45/151; UNGA Res 46/130 (17 December 1991) UN Doc A/RES/46/130; UNGA Res 47/130 (18 December 1992) UN Doc A/RES/47/130; UNGA Res 48/124 (20 December 1993) UN Doc A/RES/48/124; UNGA Res 49/180 (23 December 1994) UN Doc A/RES/49/180; UNGA Res 50/172 (22 December 1995) UN Doc A/RES/50/172; UNGA Res 52/119 (12 December 1997) UN Doc A/RES/52/119; UNGA Res 54/168 (17 December 1999) UN Doc A/RES/54/168; UNGA Res 56/154 (19 December 2001) UN Doc A/RES/56/154; UNGA Res 58/189 (22 December 2003) UN Doc A/RES/58/189; UNGA Res 60/164 (16 December 2005) UN Doc A/RES/60/164.

²⁵⁹ UNGA Res 69/L.54 (23 February 2015) UN Doc A/RES/69/L.54.

²⁶⁰ UNGA Res 55/96 (28 February 2001) UN Doc A/RES/55/96, para 1(d)(iv).

²⁶¹ Boutros Boutros-Ghali, *An Agenda for Democratization* (United Nations 1996).

intervention envisaged by article 2(7) of the UN Charter.²⁶² Other prominent texts elucidating the global belief in the importance of democracy in international order are the Vienna Declaration and Programme of Action of the 1993 World Conference on Human Rights,²⁶³ the Millennium Declaration of 8 September 2000²⁶⁴ and the World Summit Outcome of 16 September 2005.²⁶⁵

There is now a wide array of scholarly opinions arguing for the increasing role of UNGA resolutions as treasure house of *opinio juris*. To illustrate, Thirlway contemplated that in view of the changing nature of the international society one can assert that the scope of custom has enlarged to encompass UNGA resolutions.²⁶⁶ Some adopted even a more cutting-edge standpoint by perceiving General Assembly resolutions not only as expressions of *opinio juris* but also as instances of state practice *par excellence*.²⁶⁷ Yet, others pinpoint to the anachronistic nature of the doctrine of sources incapable to address the significance of the international organisations' resolutions in the development of customary international law.²⁶⁸ Noteworthy, the World Court in some of its judgments gave a due regard to the role of UNGA resolutions in displaying *opinio juris*.²⁶⁹ The view of Judge Hersch Lauterpacht as expressed in his separate opinion to the 1955 *South-West Africa Voting Procedure Advisory Opinion* pointedly reflects the role of UNGA resolutions in international law founded on constitutional principles and merits separate quotation. He contended that UNGA recommendation is:

[A] legal act of the principal organ of the United Nations which Members of the United Nations are under a *duty to treat with a degree of respect* appropriate to a Resolution of the General Assembly [...]. Although there is no automatic obligation to accept fully a particular recommendation or series of recommendations, *there is a legal obligation to act in good faith* in accordance with the principles of the Charter.²⁷⁰

²⁶² *ibid* para 8.

²⁶³ Vienna Declaration and Programme of Action (12 July 1993) UN Doc A/CONF.157/23, para 8.

²⁶⁴ UNGA Res 55/2 (8 September 2000) UN Doc A/RES/55/2, art 24.

²⁶⁵ UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, art 135.

²⁶⁶ Hugh Thirlway, 'The Sources of International Law' in Malcolm D Evans (ed), *International Law* (OUP 2010) 115.

²⁶⁷ Institut de Droit International, *Livre du Centenaire 1873-1973* (S Karger Pub 1975) 196, 271-75; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) 70.

²⁶⁸ Steven Wheatly, *The Democratic Legitimacy of International Law* (Hart Publishing 2010) 255.

²⁶⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 105; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 188.

²⁷⁰ *Voting Procedure on Questions relating to Reports and Petitions Concerning the Territory of South-West Africa* (Advisory Opinion) Separate Opinion of Judge Lauterpacht [1995] ICJ Rep 90, 120 (emphasis added).

To put it differently, failure to act in accordance with General Assembly resolutions can be equivalent to ‘disloyalty to the Principles and Purposes of the Charter’.²⁷¹ In addition to UNGA resolutions, there is a variety of other international documents containing provisions of constitutional significance and backed up by a near-universal acceptance. While a comprehensive account of all these instruments would need a separate book, it suffices to mention the UN Commission on Human Rights/Human Rights Council and the ICCPR Human Rights Committee.

The former Commission on Human Rights passed several landmark resolutions regarding democracy. In 1999, it adopted resolution ‘Promotion of the Right to Democracy’,²⁷² which explicitly referred to the right to democratic governance, which, in its turn, included a range of traditional civil and political rights and freedoms, such as freedom of expression, thought and association, the right to free and fair elections, the right to political participation, as well as the novel ‘right of citizens to choose their governmental system through constitutional or other democratic means’.²⁷³ While the title of the resolution was an object of fierce debates, it did not attract any negative vote. Later resolutions omitted the express reference to democratic entitlement but specified some essential elements of democracy, such as, for instance, respect for freedoms of association, expression and opinion, the rule of law and separation of powers, independent judiciary, political pluralism, transparency and accountability of public officials and institutions and pluralistic media, which signifies a huge step forward when it comes to the definition of democracy.²⁷⁴ In one of its latest resolutions, the Commission defined plural political system as the one in which ‘persons entitled to vote must be free to vote for any candidate for election and free to support or to oppose Government, without undue influence or coercion of any kind that may distort or inhibit the free expression of the elector’s will’.²⁷⁵ This list of essential elements of democracy outlines the basic prerequisites for the effective functioning of democracy in terms of its origin and exercise that go well beyond the electoral conception.

The Human Rights Council, which replaced the Commission in 2006, has also demonstrated its commitment to democracy.²⁷⁶ Its resolution 19/36 is instructive in this respect. It enlists such vital elements of democratic entitlement as freedom of association, assembly, expression, conscience and opinion, the right to political participation, the right to free and fair elections,

²⁷¹ *ibid.*

²⁷² UNCHR Res 57 (1999) UN Doc E/CN.4/RES/1999/57.

²⁷³ *ibid* para 2.

²⁷⁴ UNCHR Res 47 ‘Promoting and Consolidating Democracy’ (2000) UN Doc E/CN.4/RES/2000/47, para 1(d)(ii); UNCHR Res 46 ‘Further Measures to Promote and Consolidate Democracy’ (2002) UN Doc E/CN.4/RES/2002/46, para 1.

²⁷⁵ UNCHR Res 2005/32 ‘Democracy and the Rule of Law’ (2005) UN Doc E/CN.4/RES/2005/32, para 2.

²⁷⁶ See UNHRC Res 8/5 (2008) UN Doc A/HRC/RES/8/5; UNHRC Res 18/15 (2011) UN Doc A/HRC/RES/18/15; UNHRC Res 19/36 (2012) A/HRC/RES/19/36.

respect for the rule of law, the separation of powers, the independence of the judiciary and multipartyism.²⁷⁷ It also stresses that effective and *legitimate* government is the one formed in democratic process and respectful of human rights²⁷⁸ and based on ‘full participation of all parties and ethnic groups’.²⁷⁹ Similarly to the Commission, the Council’s understanding of democracy entails more than the holding of elections at regular intervals.

The Human Rights Committee as the primary monitoring and enforcement mechanism of the ICCPR, in the meantime, adopts general comments, views on individual communications and concluding observations. General comments are ‘today one of the potentially most significant and influential tools available to each of the six United Nations human rights treaty bodies in their endeavours to deepen the understanding and strengthen the influence of international human rights norms’.²⁸⁰ By essence, their value and goal lie in interpreting in authoritative manner treaty terms. Despite their non-binding character, they are not insignificant, and there should at least be a rebuttable presumption that they reflect universal *opinio juris*.²⁸¹ Moreover, state parties have a duty of good faith to cooperate with a treaty body as envisaged by general principles of treaty law.²⁸² HRC’s General Comment 25 is one of the most significant documents produced by the Committee to elaborate and interpret the vague provisions of article 25 ICCPR. Not only did the Committee recognise that article 25 can only be realised in the democratic system based on free and fair electoral process, but it also stressed the direct link between democracy and multipartyism: ‘The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties’.²⁸³ It further asserted that ‘[p]arty membership should not be a condition of eligibility to vote, nor a ground of disqualification’.²⁸⁴ The HRC reiterated its stance to the issue of the one-party system in *Bwalya v Zambia*, where it affirmed the incompatibility of restrictions on political activity outside the only recognised political party with article 25 of the Covenant.²⁸⁵

²⁷⁷ UNHRC Res 19/36 (2012) A/HRC/RES/19/36, paras 1-2.

²⁷⁸ *ibid* para 5.

²⁷⁹ UNHRC Res 12/20 (2009) UN Doc A/HRC/RES/12/20, para 2(b).

²⁸⁰ Philip Alston, ‘The Historical Origins of the Concept of “General Comments” in Human Rights Law’ in L Boisson de Chazournes and V Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality, Liber Amicorum Georges Abi-Saab* (Brill 2001) 773.

²⁸¹ David McGrogan, ‘On the Interpretation of Human Rights Treaties and Subsequent Practice’ (2014) 32 NQHR 347, 367.

²⁸² Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 33 (VCLT) art 26 (‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith’).

²⁸³ UNHRC ‘General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote)’ (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 17.

²⁸⁴ *ibid* para 10.

²⁸⁵ *Bwalya v Zambia* (1988) 5 Selected Decisions of the Human Rights Committee 23, para 6.6.

Other non-treaty instruments reflecting global consensus on the existence of democratic entitlement are examined in section 4.3.2. For the purpose of the present discussion it suffices to stress that there is a striking degree of convergence between the fundamental elements of democracy defined by the UN organs and the democracy-related criteria elaborated by other inter-governmental institutions. Taken together, they provide a broad international consensus on the central procedural, institutional and substantive building blocks of democracy. This was confirmed by the UN Secretary-General who asserted that the organisation's position on democracy is based on 'universal principles, norms and standards, emphasising the internationally agreed normative content', which stem from preamble and article 1 of the UN Charter, referring to such essential democratic underpinnings as 'life in larger freedom', 'self-determination', 'human rights' and 'fundamental freedoms', as well as political rights recognised in the UDHR and subsequent human rights treaties and instruments.²⁸⁶

Outside the discussion on legitimacy of modern theories of custom, the resort to non-binding instruments as proof of state practice and/or *opinio juris* has been criticised in many respects.²⁸⁷ One of the most important criticisms is the alleged incapability of a non-binding instrument to serve as an evidence of *opinio juris*. For example, it has been suggested that the voting in the adoption of a UNGA resolution is not necessarily reflective of states' legal consciousness. The voting is a political act and not legal one. It is that states know that the resolution or declaration in question has only a hortatory effect that they vote in affirmative.²⁸⁸ However, it is fair to say that the reference to state practice is fraught with the same, if not even worse, difficulties. How indeed the nature of an act as is expressed in the voting in the international organisation is qualitatively different from the act of the same state elsewhere? If one argues that a certain state act can be characterised as an instance of state practice because it is constrained by (domestic) law and is, henceforth, juridical, the same can be claimed with regard to the act of voting. State officials do not vote irrespective of what provisions of their domestic normative systems stipulate and are therefore as juridical as any other acts. It is judges and other representatives of legal profession that identify through the act of interpretation whether the act concerned contains enough legal elements to be regarded as juridical. No act is inherently political or inherently

²⁸⁶ UNSG, Guidance Note of the Secretary-General on Democracy (September 2009) 1-2 <http://www.un.org/democracyfund/sites/www.un.org.democracyfund/files/file_attach/UNSG%20Guidance%20Note%20on%20Democracy-EN.pdf> accessed 6 June 2017.

²⁸⁷ See eg Jure Vidmar, 'Multiparty Democracy: International and European Human Rights Law Perspectives' (2010) 23 LJIL 209, 218.

²⁸⁸ See eg Stephen M Schwebel, 'The Effect of Resolutions of the U.N. General Assembly on Customary International Law' (1979) 73 ASIL Proc 301, 309; Karol Wolfke, *Custom in Present International Law* (2nd edn, Martinus Nijhoff 1993) 84; Gennady M Danilenko, *Law-Making in the International Community* (Martinus Nijhoff 1993) 203-10.

juridical.²⁸⁹ Once the commonality between various states' acts is acknowledged, the reference to UNGA resolutions and non-treaty documents of other international organisations as expressions of *opinio juris* needed for the formation of a new customary norm is not that 'weird' any more. There is, however, an important caveat here to keep in mind. Not all the resolutions of the UNGA can be regarded as embodying *opinio juris* but solely those touching upon the most fundamental issues and enshrining global values as well as attracting acceptance by all or most members.

Can one thus claim that states are now customarily obliged to introduce and maintain democratic form of governance? If so, what understanding of democracy does such obligation entail? According to one authoritative view, democracy did acquire a status of customary norm but with *ratione personae* and *ratione materiae* limitations. On the one hand, it is not applicable to states that are persistent objectors. On the other hand, it does not extend beyond holding free and fair elections and a minimum respect for some basic human rights.²⁹⁰ It is, hence, a regional customary norm, covering such regions as Europe and America, to set up and protect procedural democracy. However, the argument about the alleged material and personal limitations of the scope of the right to democracy does not stand closer scrutiny. Firstly, the above findings illustrate that the right to democracy does entail other (substantive) elements apart from electoral method. The requirement of *free* and *fair* elections coupled with the obligation to respect the freedoms of opinion, assembly and association, the rule of law and separation of powers, political pluralism and judicial independence, indicated in the globally endorsed instruments and applied in the area of post-conflict reconstruction, state-building, recognition and development policies, indicate that democracy is not confined to electoral competition (important as it is, no doubt, for any democratic system) but represents a normative framework of equality and political empowerment by means of participation in decision-making processes both during elections as well as between electoral campaigns. This effectively means that the international community is no longer willing to accept a state's claim of being democratic if it substantiates this claim by a mere reference to the existence of the institution of elections whereas other 'essential elements of democracy' are persistently ignored.²⁹¹

Secondly, the view that the right to democracy cannot claim universality due to the existence of persistent objectors is not fully correct either. First, the doctrine of the persistent objector is relatively new and emerged as a result of particular political circumstances of the 1960s and early 1970s, namely Western states' efforts to free themselves from the will of the international

²⁸⁹ Onuma Yasuaki, 'The ICJ: An Emperor Without Clothes? International Conflict Resolution, Article 38 of the ICJ Statute and the Sources of International Law' in Ando Nisuke and others (eds), *Liber Amicorum Judge Shigeru Oda* (Vol 1, Kluwer Law International 2002) 205.

²⁹⁰ Jean d'Aspremont, *L'État non démocratique en droit international* (Pedone 2008) 340.

²⁹¹ See also Christian Pippan, 'Review of Jean d'Aspremont. *L'État Non Démocratique en Droit International. Étude Critique du Droit International Positif et de la Pratique Contemporaine*' (2009) 20 EJIL 1263, 1280.

community legalised in customary rules developed in the context of multilateral fora, in which the newly independent nations constituted a majority.²⁹² Second, while the theoretical significance of the concept of the persistent objector is undeniable, its practical application is close to non-existent, as ‘no tribunal has ever ruled that the status of persistent objector can *effectively* prevent the application of a norm of customary law to the objecting State’.²⁹³ Moreover, states are hesitant to call themselves persistent objectors in their foreign relations as this would isolate them from the rest of the international community. Rather, they claim that the norm in question has not yet crystallised into a customary norm.²⁹⁴ In case states do avail themselves of the objector status, the latter is not recognised by other states, which rather view them as law-breakers.²⁹⁵

Third, the theory of persistent objector is fraught with logical inconsistencies. It is claimed to be based on political convenience rather than legal reasoning; and it is not applicable to new states and *jus cogens* norms.²⁹⁶ Ultimately, universalist assumptions of international human rights law are compromised by the effects of the persistent objector thesis. By allowing individual states to opt out of their human rights obligations, whether on grounds of principle or expediency, undermines the very theoretical foundations of the human rights regime.²⁹⁷ All these considerations negate the existence of a persistent objector status in international law in general and human rights law in particular. Moreover, constitutionalisation of international law entails the diminishing role of the concept of persistent objector because it ‘promotes disharmony and discord’ in the system.²⁹⁸ Thus, the international community continuously inflicts political pressure on the objector states to conform to the new standards accepted by the majority of states. Because the political stakes of non-adherence are high, dissenting states will eventually adopt the majority position. It is hence legitimate to suggest that the nature of the concept of persistent objector is provisional: states can only employ it for a limited period of time as a political tool to gain time and lobby other states to prevent the rule from acquiring customary status. Should the rule develop into customary law, it is binding on all, including the initial objector.

²⁹² See Patrick Dumberry, ‘Incoherent and Ineffective: The Concept of Persistent Objector Revisited’ (2010) 59 ICLQ 779, 782-83; Patrick J Kelly, ‘Customary International Law in Historical Context: The Exercise of Power Without General Acceptance’ in Brian D Lepard (ed), *Reexamining Customary International Law* (CUP 2017) 81-82.

²⁹³ Patrick Dumberry, ‘Incoherent and Ineffective: The Concept of Persistent Objector Revisited’ (2010) 59 ICLQ 779, 790 (original emphasis).

²⁹⁴ Pierre-Marie Dupuy, ‘A Propos de l’opposabilité de la coutume générale: enquête brève sur l’objecteur persistant’ in *Melanges Michel Virally* (Pedone 1991) 264.

²⁹⁵ Jonathan Charney, ‘Universal International Law’ (1993) 87 AJIL 529, 539.

²⁹⁶ Patrick Dumberry, ‘Incoherent and Ineffective: The Concept of Persistent Objector Revisited’ (2010) 59 ICLQ 779, 794-99.

²⁹⁷ Holding Lau, ‘Rethinking the Persistent Objector Doctrine in International Human Rights Law’ (2005) 6 Chi J Int’l L 495, 501.

²⁹⁸ Jonathan Charney, ‘The Persistent Objector Rule and the Development of Customary International Law’ (1985) Brit YBIL 1, 21.

As of 2018, 116 out of 195 nations are regarded as (electoral) democracies.²⁹⁹ Albeit not all of them can be characterised as *liberal* democracies, they nonetheless provide a strong evidence of international opinion about the practice. It is also of note here that only four states explicitly claim being non-democracies, namely Vatican City (monarchy), Saudi Arabia (Islamic monarchy), Burma (military dictatorship) and Brunei (Islamic monarchy).³⁰⁰ The remaining states assert the special character of their democracies by appealing to cultural differences, traditional modes of government and special circumstances. Such a strategic shift from the proclamations of the universal superiority of one's form of government to defensive claims of exceptionalism is an evidence of universal *opinio juris* that democracy is the only form of government compatible with international law, whilst the practice might be different. According to the traditional view, for a state to qualify as a persistent objector, it must have raised its objection at the sufficiently early stage and in a clear and consistent manner. It is, thus, fair to suggest that on the orthodox account only four mentioned states qualify as persistent objectors to the democratic rule. Other states that do not practice democracy and yet claim democratic credentials fail to evidence their objection in a clear and consistent manner and, thus, cannot be qualified as persistent objectors. However, as has been outlined above, several prominent scholars opined that the status and effect of the persistent objector rule is slightly different in international human rights law than in general international law. They invoked universalist foundations of the international human rights regime³⁰¹ and the nature of the norm in question (how important is the norm).³⁰² Thus, considering the fact that human rights are universal and states agreed to honour them by participation in the UN human rights regime (original consent), states are estopped from raising objections. On this account, state consent is properly presumed because the state in question has already consented to the universality of human rights.³⁰³ Additionally, since the democratic principle has been repeated on numerous occasions in the international and regional fora and found way to international and regional human rights conventions as well as numerous non-treaty instruments attracting no explicit objection, it is plausible to suggest that the world considers the norm valid, which weakens the objector's position. Henceforth, states manifesting persistent refusal to introduce and maintain democracy may

²⁹⁹ See Freedom House, 'Freedom in the World 2018', Annual Report <<https://freedomhouse.org/report/freedom-world-2018-table-country-scores>> accessed 14 February 2018.

³⁰⁰ See Nobelprize.org <https://www.nobelprize.org/educational/peace/democracy_map/production/index.html> (accessed 28 February 2018).

³⁰¹ Holding Lau, 'Rethinking the Persistent Objector Doctrine in International Human Rights Law' (2005) 6 Chi J Int'l L 495.

³⁰² Lynn Loschin, 'The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework' (1996) 2 UC Davis J Int'l L & Policy 147, 164.

³⁰³ Holding Lau, 'Rethinking the Persistent Objector Doctrine in International Human Rights Law' (2005) 6 Chi J Int'l L 495, 503.

be today regarded as in violation of the global norm.³⁰⁴ All in all, it is fair to conclude that the right to democracy reflects customary international law.

4.3. Softening of International Law

4.3.1. The Doctrine of Sources: A Reconsideration

Discussion of soft law usually takes place in the context of discourse about sources. The prevailing orthodox reading of international law conceives of ICJ Statute article 38(1) as an authoritative and exhaustive enlistment of the sources of international law, which include ‘international conventions’, ‘international custom’ and ‘the general principles of law recognised by civilised nations’.³⁰⁵ It means that a norm must fall within one of these categories in order to be a binding legal norm. Article 38, which was firstly adopted in the Statute of the Permanent Court of International Justice (PCIJ) in the early 1920s and eventually inherited by the ICJ, was heralded as a milestone in the international legal doctrine, as it was perceived as a long-desired solution to the problem of indeterminacy having been plaguing international law over most of its history. A ‘closed’ and universal one-size-fits-all list of sources was regarded as a better paradigm than a fragmented and *ad hoc* system of the pre-war international law where everything goes.³⁰⁶ State consent and vocabulary of formalisation (refusal to look for materials not formally recognised as law) became the hallmarks of legitimacy for this project of reconstruction of public international law. However, the reassuring impression of brevity, order, predictability and systemic unity that one initially obtains when first confronting the doctrine are eventually replaced by feelings of unease and disharmony on a closer read. Instead of providing for a workable framework for law-ascertainment, the doctrine of sources is the more impenetrable the more one attempts to make sense of it: it ‘is fraught with terminological discrepancy, scholarly disagreement, logical and epistemological incoherence, inability to capture the diversity of modern law-making practices, inability to stand the test of “high theory”, and so on’.³⁰⁷

First of all, the initial task of article 38 was to serve as a sort of a guide to instruct the World Court on materials it could avail itself of in adjudicating

³⁰⁴ See also Christian Pippan, ‘International Law, Domestic Political Orders, and the “Democratic Imperative”: Has Democracy Finally Emerged as a Global Legal Entitlement?’ (Jean Monnet Working paper 02/10, 2010) 7, 27 <<http://www.jeanmonnetprogram.org/paper/international-law-domestic-political-orders-and-the-democratic-imperative-has-democracy-finally-emerged-as-a-global-legal-entitlement/>> accessed 6 June 2017.

³⁰⁵ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute) art 38(1).

³⁰⁶ Thomas Skouteris, *The Notion of Progress in International Law Discourse* (TMC Asser Press 2010) 127.

³⁰⁷ *ibid* 140.

international disputes, which is abundantly clear from the article's chapeau: 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: [...]'.³⁰⁸ It was never meant to be an exhaustive codification of international legal sources. Moreover, the article is poorly drafted, leaves the question of hierarchy of norms unresolved and confuses formal and material sources,³⁰⁹ not to mention the fact that a provision as old as article 38, which was adopted some century ago, cannot accurately reflect all the materials and forms of state practice that constitute today's avenues of law-creation and law-ascertainment.

On a deep theoretical level, a blind reliance on state consent makes the conventional sources thesis, in the words of Koskenniemi, apologist: 'If there is no distance between "will" and "law", then there is no justification to impose a standard on a non-consenting State'.³¹⁰ Indeed, if consent is the sole prerequisite of law, why would one then draw a line between, say, treaties and other juridical acts, such as unilateral statements, or why would there be a requirement of state practice for a custom to emerge? Moreover, because there is no clear and objective process for ascertaining state will, 'voluntarism is just as abstract, subjective and subject to manipulation as naturalism'.³¹¹ Another theoretical problem with the doctrine of sources of article 38 is that the exclusive reliance on norms that can be potentially applied by the Court is reminiscent of the 'domestic model approach'. In this sense, the doctrine of sources plays a sort of a quasi-constitutional function akin to constitutions in domestic legal systems, which stipulate processes by which legal norms come into existence. However, a sophisticated legalistic culture of domestic societies as well as their highly developed judicial mechanisms are a far cry from the international law system which relies to a minimum extent on formal mechanisms for the resolution of legal disputes. Hence, a distinction between the norms of behaviour and the norms of adjudication is warranted.³¹²

Apart from incongruences on the level of theory, the changes in the international legal system triggered by the proliferation of multilateral regimes with 'third-party effects', such as, for instance, international human rights law, and the rise of international organisations as a forum for embracing, universalising and promoting global values put the doctrine under a considerable strain. Cohen identifies at least three challenges to the mainstream (consent-based) approach to international law. Firstly, after the Second World War, the inequality between states reached such unprecedented a scale that it

³⁰⁸ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute) art 38.

³⁰⁹ Ian Brownlie, *Principles of International Law* (6th edn, OUP 2003) 5.

³¹⁰ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 310.

³¹¹ Martti Koskenniemi, 'Introduction' in Martti Koskenniemi (ed), *Sources of International Law* (Ashgate 2000) xix.

³¹² Onuma Yasuaki, 'The ICJ: An Emperor Without Clothes? International Conflict Resolution, Article 38 of the ICJ Statute and the Sources of International Law' in Ando Nisuke and others (eds), *Liber Amicorum Judge Shigeru Oda*, vol 1 (Kluwer Law International 2002) 201.

becomes increasingly difficult to prove state consent. Secondly, the rapid increase in the number of states lead to the adoption of ‘thinner agreements’ in terms of their meaning, nature and content. Finally, the emergence of the new type of sources expressing the needs of the ever-interdependent society assumes an uneasy relationship with the rigid framework established by the current source thesis.³¹³ It follows that the traditional doctrine of sources, instead of fulfilling a promise of order, foreseeability, integrity and objectivity, is in the end a barrier in the fulfilment of systemic goals that the international community strives to achieve by means of international law. *Ergo*, revision is imperative. The framework of global constitutionalism provides for necessary theoretical foundation and empirical justification for such revision. International law in the process of constitutionalisation presupposes a rather attenuated model of the doctrine. State consent retains its leading position but it is rather a soft version of consent: it is increasingly tacit, presumed and non-withdrawable. The fact that in certain cases states cannot object to something that they have once consented to resolves the problem of apologism as the ‘controlled’ distance is maintained between state will and the source of legal obligation. Yet, because it is only norms that states at certain point happened to will, whether explicitly or tacitly, the danger of naturalist utopianism — where the law’s binding character is sought from somewhere beyond the state — is averted too.

That said, international law does not have a single document specifying how it is made. However, because there is no other authoritative instrument instructing how legal norms are to be discovered, article 38 of the ICJ Statute is undeniably at the epicentre of law-ascertainment. This notwithstanding, the list of sources it dictates should not be perceived as exhaustive, but rather as a useful starting point for locating legal norms. The ICJ itself confirmed this view by acknowledging that states’ unilateral acts can represent sources of international law not mentioned in article 38.³¹⁴ This is but one evidence of a general trend to identify norms of behaviour outside the ambit of conventional lawmaking mechanisms. From a theoretical perspective, such novel ‘manifestations of normativity’ include, according to d’Aspremont, substantive validity – a conception of law-ascertainment based on substantive values rather than the source thesis; effect- or impact-based conceptions of international law-ascertainment whereby norms come to be regarded as legal whenever they effectively regulate relations between the subjects; process-based conceptions of international law-ascertainment, most commonly associated with the New Haven School, where legal norms emerge as a result of authoritative and controlled decision-making; and other manifestations of the deformalisation of international law-identification mostly visible in the

³¹³ Harlan Grant Cohen, ‘Finding International Law: Rethinking the Doctrine of Sources’ (2008) 93 Iowa L Rev 65, 86-87.

³¹⁴ *Nuclear Tests Case (Australia & New Zealand v France)* (Merits) [1974] ICJ Rep 457, para 46.

theory of softness of international law.³¹⁵ Notably, to d'Aspremont, it is only a substance-based conception of law-ascertainment that can be conceptualised as neoliberal or anti-pluralist, as the term is treated in this work. This thesis, by contrast, adopts a broader understanding of new liberalism, which embraces all the afore-enlisted manifestations of deformalisation of law-identification inasmuch as they represent a value-based disconnect between state consent and a valid legal rule. In what follows, I shall attempt to examine one of the forms of deformalisation of the source thesis propelled by the advance of global constitutionalism, namely the soft law doctrine, and what effect it has on the right to democracy.

4.3.2. Non-binding Instruments as a Source of the Right to Democracy

The process of softening of international law, that is an increasing resort to non-treaty instruments in the regulation of international relations, signifies constitutionalisation of international law for:

Non-binding commitments may be entered into precisely to reflect the will of the international community to resolve a pressing global problem over the objections of the one or few states causing the problem, while avoiding the doctrinal barrier of their lack of consent to be bound by the norm.³¹⁶

The term 'soft law' is generally used to designate international instruments that are purposely excluded from the definition of treaty and aim to promulgate principles and rules of universal application without an intention to enter into binding commitments.³¹⁷ It is commonplace to define these instruments in negative terms, as lacking one or several characteristics normally ascribed to international law, such as, e.g., justiciability, precise normative content, enforceability and formal legal status.³¹⁸ Their relevance to international law is often underscored, *inter alia*, by their close resemblance to law, the extent to which they shape legal discourse, the extent of consensus around them, their impact on the behaviour of international actors and outcomes in international society.³¹⁹ Yet, the most coherent approach to soft law from the standpoint of the doctrine of sources is to conceive of it in terms of the degree of hardening of a norm into a rule of international law. Notably, not every normative

³¹⁵ Jean d'Aspremont, *Formalism and the Sources of International Law: A Theories of the Ascertainment of Legal Rules* (OUP 2011) 120-29.

³¹⁶ Dinah Shelton, 'International Law and "Relative Normativity"' in Malcolm D Evans (ed), *International Law* (OUP 2010) 144.

³¹⁷ Alan Boyle and Chrisitne Chinkin, *The Making of International Law* (OUP 2007) 212; Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013) 49-50.

³¹⁸ Jaye Ellis, 'Shades of Grey: Soft Law and the Validity of Public International Law' (2012) 25 LJIL 313, 315-18.

³¹⁹ *ibid* 318-19.

commitment or statement can qualify as soft law but only such which ‘acquires a degree of traction [acceptance by states]’ and is ‘in the process of incubation’ which makes it a viable candidate for crystallising into hard law, though it may ultimately fail to become a binding rule of international law.³²⁰ Thus, the category of soft law can be understood as the one referring to ‘rules [...] that are in the process of becoming, though may not ultimately become, binding rules of international law in the form of any of the established sources of international law — customary law, general principles of law, or as a binding interpretation of a rule of a treaty law’.³²¹ Because constitutionalisation of international law is driven by international consensus over a set of principles crucial for the existence and proper functioning of the international community, softening of international law, whereby global values find their most frequent and elaborate endorsement in non-binding instruments, is manifestation of global constitutionalisation.

Importantly, the ever-frequent invocation of non-binding instruments does not obliterate the positivist premises of the international legal doctrine, such as foreseeability and validity, since it is fair to say that the VCLT does not deny the status of law to them. As Hillenberg observed, the Vienna Convention applies to ‘international agreements concluded between States and governed by international law’.³²² To automatically exclude soft law instruments from the definition is too simplistic an approach as the drafting history of the Convention reveals that the qualification ‘governed by international law’ pertains to the distinction between agreements under international law and those under domestic law, not between treaties proper and soft law.³²³ Moreover, since state will is so commonly viewed as the lynchpin of international law, there is no reason to deny states the possibility to subscribe to international commitments in a less formal manner.³²⁴ Strikingly, the case law of the ICJ³²⁵ illustrates that while such soft law instruments as recommendations of international organisations are not binding as a matter of definition, they are nonetheless not without legal effect. Apart from being considered as evidence of existing law, or formative of state practice or *opinio juris*, or as aiders in the interpretation of treaty law, they increasingly assume

³²⁰ Thomas Gammeltoft-Hansen, Stephanie Lagoutte and John Cerone, ‘Introduction: Tracing the Roles of Soft Law in Human Rights’ in Thomas Gammeltoft-Hansen, Stephanie Lagoutte and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 5.

³²¹ John Cerone, ‘A Taxonomy of Soft Law: Stipulating a Definition’ in Thomas Gammeltoft-Hansen, Stephanie Lagoutte and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 18.

³²² Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 33 (VCLT) art 2(1)(a).

³²³ Hartmut Hillenberg, ‘A Fresh Look at Soft Law’ (1999) 10 EJIL 499, 503.

³²⁴ *ibid* 506.

³²⁵ See eg *Nuclear Tests Case (Australia & New Zealand v France)* (Merits) [1974] ICJ Rep 457, para 46; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, 186.

a more autonomous role in the ascertainment of legal rules. On this reading, they certainly constitute a part of international law.³²⁶

From the vantage point of global constitutionalism, more frequent invocation of soft-law instruments allows to fill gaps in international law and thereby aids in constructing international law as a unified normative system where global values, as commonly found in the text of non-binding commitments, act as a sort of glue holding autonomous legal regimes together. This effectively means that not only is softening of international law a reaction to, and a bulwark against, fragmentation within and of international law but also an engine of unity between legal systems and regimes. Moreover, the specificities of international human rights law, such as, for example, the historical lack of enforcement mechanisms in the human rights field, facilitate a more privileged position of soft law in resolving interpretative indeterminacies. In this context, soft law instruments assume norm-filling (e.g., commentaries of the human rights bodies interpreting treaty provisions) and norm-creating functions (non-binding norms harden into a binding law when they reflect state consensus on certain issues).³²⁷ As regards the right to democracy, non-binding instruments provide for the most sophisticated account of democracy as a human right and a global value. Apart from international non-treaty agreements such as UNGA resolutions, resolutions of the Human Rights Council and its predecessor, the Commission on Human Rights, as well as general comments of the Human Rights Committee, discussed in the context of modern custom,³²⁸ there is a plethora of regional soft law documents endorsing democracy.

In Europe, the OSCE, previously the Conference on Security and Cooperation in Europe (CSCE), undertook a missionary role in the promotion of the democratic entitlement. Due to space limitations, the focus is placed on three principal documents employing human rights language in their references to democracy. The first document adopted by the CSCE, ‘Charter of Paris for a New Europe’ of 1990, committed member states ‘to build, consolidate and strengthen democracy as the only system of government of our nations’.³²⁹ It further articulated that ‘[d]emocratic government is based on the will of the people, expressed regularly through free and fair elections’.³³⁰ The Charter also included essential elements of democratic entitlement, such as the respect for

³²⁶ Alain Pellet, ‘Article 38’ in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2006) 714; Jean d’Aspremont, *Formalism and the Sources of International Law: A Theories of the Ascertainment of Legal Rules* (OUP 2011) 149.

³²⁷ See Thomas Gammeltoft-Hansen, Stephanie Lagoutte and John Cerone, ‘Introduction: Tracing the Roles of Soft Law in Human Rights’ in Thomas Gammeltoft-Hansen, Stephanie Lagoutte and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 6-7.

³²⁸ See section 4.2.2.

³²⁹ OSCE, The Charter of Paris for a New Europe (21 November 1990) 3 <<https://www.oscepa.org/documents/all-documents/documents-1/historical-documents-1/673-1990-charter-of-paris-for-a-new-europe/file>> accessed 30 August 2016.

³³⁰ *ibid.*

human rights and the rule of law, representativeness, legal pluralism, accountability to the electorate and impartial system of justice.³³¹ Needless to say, according to conventional view, the role of this instrument is minor, if not wholly futile, in serving as a norm of conduct for states in their relations with one another. And yet, given its deliberately norm creating language³³² enshrining values common to all European states, it is a perfect tool to interpret existing obligations of the Council of Europe and its member states.

The second document with even more detailed democratic provisions is the 1990 'Copenhagen Document'. It states that:

[P]luralistic democracy and the rule of law are essential for ensuring respect for all human rights and fundamental freedoms, the development of human contacts and the resolution of other issues of a related humanitarian character. They therefore welcome the commitment expressed by all participating States to the ideals of democracy and political pluralism as well as their common determination to build democratic societies based on free elections and the rule of law.³³³

It also affirmed such inherent elements of the right to democracy as the rule of law, free and fair elections, representative character of governmental structures and political pluralism.³³⁴

Last but not least, the 1991 'Moscow Document' urges the revision of the traditional concept of sovereignty: '[T]he commitment undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned'.³³⁵ The document also condemns an unconstitutional overthrow of a legitimately elected government and speaks for the inadequacy of the effective control test as a condition for international recognition.³³⁶

In African region, apart from important treaty standards touching upon the issues of democracy, such as the Constitutive Act of the African Union (AUCA), the African Charter on Human and Peoples' Rights and the African Charter on Democracy, Elections and Governance, there is a dense variety of soft instruments containing more elaborate terms with respect to state obligations to install and maintain a democratic form of government.³³⁷ One of

³³¹ *ibid.*

³³² Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 AJIL 46, 67.

³³³ OSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990) preamble <<http://www.osce.org/odihr/elections/14304>> accessed 29 August 2016.

³³⁴ *ibid* paras 3, 5.

³³⁵ OSCE, Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (4 October 1991) preamble <<http://www.osce.org/odihr/elections/14310>> accessed 31 August 2016.

³³⁶ *ibid* para 17.

³³⁷ See eg Organisation of African Unity, Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World (OAU Addis Ababa 1990) AHG/Decl.1 (XXVI); The African Commission on Human and Peoples' Rights,

the most eminent examples is the 2000 ‘Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government’.³³⁸ Drawing on articles 4 and 30 AUCA providing for the condemnation of the unconstitutional changes of government and suspension of state’s membership rights whose government came to power through unconstitutional means respectively, the Declaration envisages in more elaborate terms the operation of this sanction mechanism.³³⁹ Similar mechanisms of response to *coups d’état* have been established by other regional organisations in Africa. These include the 1991 Declaration of the ECOWAS, the essence of which was eventually incorporated into the 1993 Treaty of ECOWAS;³⁴⁰ the 2001 Protocol on Democracy and Good Governance expressly recognising the obligation to hold free, fair and transparent elections;³⁴¹ and the SADC Principles and Guidelines Governing Democratic Elections.³⁴²

Turning finally to Americas, the Inter-American Democratic Charter in its remarkable article 1 provides for a right of the peoples of the Americas to democracy and obliges their governments to promote and defend it.³⁴³ Similarly to its regional counterparts, the Charter recognises democracy as ‘essential for the social, political and economic development’, whose constitutive elements include, among others:

[R]espect for human rights and fundamental freedoms, access to and exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.³⁴⁴

Prior to this, the OAS took three steps to promote and consolidate democracy in American continent: the 1991 Santiago Commitment, the 1991 Resolution

‘Resolution on the Military’ (25 October—3 November 1994) Res.10(XVI)94; Organisation of African Unity, Solemn Declaration on the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA) (OAU Lome 2000) AHG/Decl.4 (XXXVI) etc. For a more detailed overview of the soft instruments adopted within the framework of the OAU/AU aimed to promote democracy and condemn military putsches, see Djacoba Liva Tehindrazanarivelo, ‘Les sanctions de l’Union africaine contre les coups d’État et autre changements anticonstitutionnels de gouvernement: potentialités et mesures de renforcement’ (2004) 12 Afr YBIL 255.

³³⁸ Organisation of African Unity (OAU Lome 2000) Doc AHG/Decl.5 (XXXVI).

³³⁹ For a more detailed analysis, see section 5.4.

³⁴⁰ Economic Community of West African States (ECOWAS) Revised Treaty (24 July 1993) 35 ILM 660.

³⁴¹ ECOWAS, ‘Protocol on Democracy and Good Governance’ (22 December 2001) Doc A/SPI/12/01.

³⁴² Southern African Development Community (Electoral Advisory Council) ‘SADC Principles and Guidelines Governing Democratic Elections’ (Mauritius, August 2004) <http://www2.ohchr.org/english/law/compilation_democracy/sadcprinc.htm> accessed 28 June 2015.

³⁴³ OAS, Inter-American Democratic Charter, OEA/Ser.G/CP-1 (11 September 2001) art 1.

³⁴⁴ *ibid* art 3.

1080 and the 1992 Protocol of Washington, commonly referred to as ‘Santiago Commitment’ or ‘Santiago Doctrine’.³⁴⁵ Whilst the essential part of the Santiago Doctrine is non-binding in principle, it has been repeatedly invoked in response to democratic threats in the American hemisphere.³⁴⁶

Before moving to criticisms voiced against the soft law doctrine, it is vital to remind the reader that Asia in view of its cultural, social and economic diversity lacks a coherent human rights framework, whether hard or soft, to draw on when arguing for the existence of the regional norm of democratic governance. In fact, many scholars claim that Asia is the only part of the world that remained to a large degree immune from global democratic developments.³⁴⁷ And yet, there is some rudimentary progress in terms of recognising democracy as the only ‘human-rights-friendly’ form of government. South East Asia and West Asia (or Middle East) are regions where the progress is the most substantial. As to the former, while there is no regional legally binding human rights convention codifying the right to democratic governance, apart from brief reference to democracy as one of the purposes of the Association of Southeast Asian Nations (ASEAN) in the 2007 ASEAN Charter,³⁴⁸ one can nonetheless observe a sea change in the political climate of the region marked by a rising interest in human rights, including the right to democracy, discernible in the recent ASEAN Human Rights Declaration.³⁴⁹ Its article 25 (the right to participate in the government of one’s country and the right to free and fair elections) basically reaffirms the provisions of article 21 UDHR and article 25 ICCPR. Another important document is the SAARC Charter of Democracy of 2011.³⁵⁰ The Charter sets a clear commitment to strengthening democratic institutions and reinforcement of democratic practices, including through the effective maintenance of checks and balances among the branches of government, guaranteeing the independence of the judiciary and respect for the rule of law and the unequivocal renouncement of any unconstitutional change of an elected government. Although the document is technically binding, its provisions are formulated in generic language, which hinders the derivation of concrete obligations therefrom.

In the Arab World, the revised Arab Charter on Human Rights, adopted in 2004 under the auspices of the League of Arab States, entered into force in

³⁴⁵ Stephen F Schably, ‘Constitutionalism and Democratic Government in the Inter-American System’ in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 162-64.

³⁴⁶ See section 5.3.

³⁴⁷ See eg Larry Diamond, ‘Why Are There No Arab Democracies?’ (2010) 21 *Journal of Democracy* 93; Tarek Masoud, ‘Has the Door Closed on Arab Democracy?’ (2015) 26 *Journal of Democracy* 74.

³⁴⁸ Charter of the Association of Southeast Asian Nations (adopted 20 November 2007, entered into force 15 December 2008) 2624 UNTS 223 (ASEAN Charter) art 1(7).

³⁴⁹ AICHR, ASEAN Human Rights Declaration (18 November 2012) <<http://www.asean.org/news/asean-statement-communications/item/asean-human-rights-declaration>> accessed 28 June 2015.

³⁵⁰ SAARC, SAARC Charter of Democracy (February 2011) <<http://www.saarc-sec.org/SAARC-Charter/5/>> accessed 22 September 2017.

2008.³⁵¹ Albeit couched in treaty language, it is essentially soft in terms of its *negotium*³⁵² given its weak implementation mechanism.³⁵³ Moreover, it does not include democratic provisions akin to other regional human rights treaties, except for vague references to the right to occupy public office in one's country and the freedoms of thought, conscience, opinion, assembly and association.³⁵⁴ In the same vein, the Cairo Declaration on Human Rights in Islam, adopted under the aegis of the Organisation of Islamic Cooperation (OIC), endorses the right to express one's opinion freely as well as the right of everyone 'to participate, directly or indirectly in the administration of his country's public affairs' and 'the right to assume public office'.³⁵⁵ Whether the expression 'indirectly' refers to representative democracy is open to debate. However, interpretation of any of the above-mentioned instruments should be done through the prism of the principles of the UDHR and the two twin covenants. For states that are not parties to the covenants, the UDHR, whose provisions are widely recognised as reflecting customary international law, imposes a direct obligation to ensure that their regional practices are not in contradiction to its provisions. It should also be noted that nearly a third of the Arab countries are members of the African Union, to whom its more elaborate standards on democracy are directly applicable.

Whether softening of international law is a layer of global constitutionalism or something else, criticisms abound. Mainstream scholars contend that legal effects that these instruments produce are not sufficient to transpose them into the realm of law. Unlike legal acts, soft law represents merely legal facts (incapable of generating binding obligations) and irrespective of the will of their authors cannot qualify as law.³⁵⁶ Further, the same strand of scholars argue for a redundancy of non-treaty commitments since when applied to a particular case, they are either employed to bolster the

³⁵¹ League of Arab States, Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) 12 IHR Rep 883.

³⁵² For a more elaborate discussion on two types of soft law, namely soft *instrumentum* and soft *negotium*, see Jean d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials: A Rejoinder to Tony D'Amato' (2009) 20 EJIL 911.

³⁵³ The Charter merely establishes an Arab Human Rights Committee composed of seven experts entrusted with the task to review state reports. There are no provisions regulating individual and/or state communications. See generally Mervat Rishmawi, 'The Arab Charter on Human Rights and the League of Arab States: An Update' (2010) 10 HRL Rev 169; Mervat Rishmawi, 'The Revised Arab Charter on Human Rights' in Catarina Krause and Martin Scheinin (eds), *International Protection of Human Rights: A Textbook* (2nd edn, Åbo Akademi University 2012).

³⁵⁴ League of Arab States, Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) 12 IHR Rep 883, arts 26, 28, 33.

³⁵⁵ Organization of the Islamic Conference, The Cairo Declaration on Human Rights in Islam (5 August 1990) UN Doc A/Conf 157/PC/62/Add.18, arts 22(a), 23(b).

³⁵⁶ Michel Virally, 'La distinction entre textes internationaux ayant une portée juridique entre leurs acteurs et textes qui en sont dépourvus' (1983) 60 *Annuaire de l'Institut de droit International* 166, 246.

application of hard law or are completely disregarded as non-law.³⁵⁷ In this sense, the concept of legality is binary: something is either binding (law) or nonbinding (non-law). To put something in between is to introduce gradation disfavoured by the mainstream: '[L]aw does not have a sliding scale of bindingness nor does desired law become law by stating its desirability, even repeatedly'.³⁵⁸ Ultimately, some legal commentators voiced concerns as to the destabilising and even destructive role of this category for the whole international normative system because of the dangers of relativism, politicisation and instrumentalisation of international law.³⁵⁹ The concept should, so the argument runs, be dismissed as useless and even pathological.³⁶⁰ Interestingly, d'Aspremont explained this wide interest in deformalisation of conventional law-ascertainment procedures through the employment of the category of soft law by pinpointing to the idiosyncrasies of academic profession:

[L]egal scholars strive to provide themselves with extra raw material to work with. Such self-serving attempt to stretch the boundaries of our discipline boils down to an instinctive quest for 'survival' for many legal scholars, as they feel constricted in a science which has proven too narrow to accommodate all of us and are enticed to look beyond the classical limits of the international legal order.³⁶¹

To cut a long story short, for some the category creates too much unmanageable subtlety and gradation,³⁶² for others it undermines the international system so that the latter can no longer serve its purpose.³⁶³

In a short response to the main criticisms, it is important to note that it is often overlooked that binding international law not infrequently faces similar

³⁵⁷ Jan Klabbers, *The Concept of Treaty in International Law* (Martinus Nijhoff 1996) 158-59. See also Jan Klabbers, 'The Redundancy of Soft Law' (1996) 65 NJIL 167, 172-73; Jan Klabbers, 'The Undesirability of Soft Law' (1998) 67 NJIL 381, 387, 391; Jean d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials: A Rejoinder to Tony D'Amato' (2009) 20 EJIL 911, 915; Laszlo Blum, 'In the Trap of a Legal Metaphor: International Soft Law' (2010) 59 ICLQ 605, 624. See generally Olufemi Elias and Chin Lim, 'General Principles of Law, "Soft" Law and the Identification of International Law' (1997) 28 Neth YBIL 4; Jean d'Aspremont, 'Softness in International Law' (2008) 19 EJIL 1084.

³⁵⁸ Dinah Shelton, 'International Law and "Relative Normativity"' in Malcolm D Evans (ed), *International Law* (OUP 2010) 166.

³⁵⁹ Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413, 423; Jean D'Aspremont and Tanja Aalberts, 'Which Future for the Scholarly Concept of Soft International Law? Editor's Introductory Remarks' (2012) 25 LJIL 309, 310.

³⁶⁰ Gaetano Arangio-Ruiz, *The UN Declaration on Friendly Relations and the System of Sources of International Law* (Alphen and den Rijn 1979) 29, 196.

³⁶¹ Jean d'Aspremont, 'Softness in International Law' (2008) 19 EJIL 1084, 1091. See also Wilhelm Wengler, 'Les Conventions "non juridique" comme nouvelles voies à cote des conventions en droit' in François Rigaux (ed), *Nouveaux itinéraires en droit: hommage à François Rigaux* (Bruylant 1993) 639.

³⁶² Jan Klabbers, 'The Undesirability of Soft Law' (1998) 67 NJIL 381; Jaye Ellis, 'Shades of Grey: Soft Law and the Validity of Public International Law' (2012) 25 LJIL 313.

³⁶³ Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413.

challenges in terms of precision, normativity (justiciability) and enforceability. A significant number of binding provisions fail to impose concrete obligations upon state parties, such as, for example, a duty to reduce greenhouse gas emissions or to improve literacy rates among girls.³⁶⁴ Moreover, it is often claimed that many economic, social and cultural rights are not susceptible to judicial review because they involve complex political choices. Yet, they are undoubtedly *legal* rights imposing *legal* obligations upon states.³⁶⁵ The positivist binary approach to soft law fails to consider various roles assumed by soft law in contemporary international relations, which sometimes is more effective in terms of compliance than hard law: soft law instruments are often drafted like binding international law providing basis for legal reasoning and disputes and have a significant bearing on the issue area concerned; they are frequently used by international organisations to regulate their internal issues and are increasingly recognised as binding on them.³⁶⁶ On top of that, states often prefer soft law when they are uncertain about the desirability of their present undertakings in the future and when in order to solve the straightforward coordination games, the existence of a focal point is enough to ensure compliance.³⁶⁷ These considerations provide a firm justification for the sustainability and coherence of soft law as a distinct analytic category and legal concept.

It is worth noting that softening of international law is a process that has already taken roots and will continue to affect international legal milieu at even more profound rate as the world is increasingly running 'post-modern'. Illustratively, Jan Klabbbers, one of the principle opponents of the soft law thesis, in his recent work claims that the source thesis is in the process of being replaced by the notion of accountability. This process is triggered by softening of international law since it becomes increasingly difficult, and therefore not that relevant anymore, to ascertain a precise legal obligation in international law containing 'varying shades of grey, from the very soft to the extremely hard'. Instead, there is a discernible tendency to focus on accountability whereby those exercising public power improperly are to be held accountable. To this effect, accountability is to be distinguished from responsibility as it is, for the most part, cast in 'soft' language.³⁶⁸ In oversimplified terms, one may

³⁶⁴ Jaye Ellis, 'Shades of Grey: Soft Law and the Validity of Public International Law' (2012) 25 LJIL 313, 317.

³⁶⁵ For the comprehensive review of the justiciability debate, see Malcolm Langford, 'The Justiciability of Social Rights: From Practice to Theory' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 29-37.

³⁶⁶ Matthias Goldmann, 'We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law' (2012) 25 LJIL 335, 346.

³⁶⁷ For a detailed discussion, see generally Andrew T Guzman and Timothy L Meyer, 'International Soft Law' (2010) 2 JLA 171. See also Joseph Gold, 'Strengthening the Soft International Law of Exchange Agreements' (1983) 77 AJIL 443, 444.

³⁶⁸ Jan Klabbbers, 'International Legal Positivism and Constitutionalism' in Jörg Kammerhofer and Jean d'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014) 279-80.

discern the struggle positivist scholars encounter in the face of changing legal environment by desperately employing traditional linguistic categories to account for facts and events not fitting neatly into the orthodox reasoning. On this view, soft law is still not considered as international law proper, but it is increasingly accepted as a reality and an instrument of modern politics and governance that cannot be wished away.

From the viewpoint of global constitutionalism, such changing legal environment marked by ‘various shades of grey’ can be characterised as the maturing of the international system since the very recourse to, and shaping of one’s behaviour in conformity with, non-treaty norms entails a certain degree of trust between the participating states that a particular undertaking will be implemented in good faith regardless its generic wording and lack of treaty form. Moreover, non-binding commitments permit, in principle, the inclusion of all interested parties in the process of international lawmaking.³⁶⁹ Enlarging the legitimacy base of international law by allowing more voices to be heard inevitably leads to the lessening of the role of individual states in the processes of decision-making and law-creation, which, in their turn, become softer. In this sense, softening of international law aids in strengthening international law’s representativeness and thus legitimacy. These vital considerations notwithstanding, to say that the right to (pluralist) democracy is a norm binding on every state, including in the Arab region, simply because the commitment to install certain representative government features in a plurality of non-binding instruments around the globe is to stretch the normative capacity of soft law to the breaking point. On the other hand, to entirely dismiss the existence of democratic commitment merely because it lacks certain formal requirements is to encourage norm fetishism, which overlooks the contingencies and subtleties inherent in the application and interpretation of law. Because soft law instruments are not the only means how global values find their way into international law, it is imperative to examine other mechanisms of law creation reflecting international consensus on vital issues of global concern, including the right to democracy. The recourse is had to general principles of law.

4.4. The Right to Democracy and General Principles of Law: An Equitable Framework for the Right to Democracy?

It is imperative to reiterate that constitutionalisation of international law entails the diminishing role of treaties and traditional custom in ordering and

³⁶⁹ Wolfgang H Reinicke and Jan Martin Witte, ‘Interdependence, Globalization, and Sovereignty: The Role of Non-binding International Legal Accords’ in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (OUP 2000) 94.

orchestrating international relations. Westphalian international legal system, being essentially concerned with the formal regulation of diplomatic relations between states, was primitive enough to rely mostly on bilateral agreements and custom derived from physical state practice as principal formal sources. However, considering the dense variety of social, economic, political and cultural settings making up the contemporary international legal order, it is increasingly difficult to conclude treaties furthering common interests and at the same time imposing concrete obligations, and/or to allow sufficient time for a custom to develop. The previously examined modern approach to custom as well as the phenomenon of softening of an international legal obligation represent important tools of legal evolution and development in line with globally endorsed principles but still struggle to firmly assert themselves in legal theory. Consequently, the ultimate mechanism of law creation capable of easily accommodating universal values and at the same time retaining solid legal base is still lacking, or so might one mistakenly think.

General principles of law — a commonly neglected third formal legal source — are perfect tools to transmit into the legal system value considerations by virtue of their flexibility, inclusiveness and abstractedness. Given their inherent logic, generality, elasticity, richness of the normative content and adaptability to a variety of circumstances they are ‘doors of entry of the extra-legal, of the axio-logic, of the social needs’.³⁷⁰ As Kolb concluded, ‘[t]he law of general principles is constitutional law in the fullest sense of the word’.³⁷¹ The unfortunate minuscule interest in them in positivist tradition is countered by the constitutional argument, which, in turn, recognises them as an epicentre of international lawmaking. Because the purpose of the third source is to allow reference to rules not directly deriving from state will but mirroring common interest of the international community as a whole, general principles assume an important role in constitutionalising international law. Their central function is to adapt existing rules to constitutional necessities in order to ensure integrity of the rules *vis-à-vis* the general international legal system and their dynamic interpretation. At this juncture, the constitutional role of general principles is apparent from their character as ‘norm-sources,’ rather than simple norms, in that they constitute a middle-ground between the concreteness of a simple rule and abstractedness of a legal idea.³⁷² Thus, it is largely due to general principles that international law can be designated as a system.

Because general principles represent formal legal source to be used as a basis for resolving international disputes, it is inconceivable why they cannot form legal foundation for the right to democracy. The following sections will revise the place of general principles of law in the international legal system and chart how equity, as a sub-category of general principles of law recognised

³⁷⁰ Robert Kolb, ‘Principles as Sources of International Law (with Special Reference to Good Faith)’ (2006) 53 NILR 1, 29.

³⁷¹ *ibid* 36.

³⁷² *ibid* 25.

by civilised nations, may impact upon the legal standing of the democratic entitlement.

4.4.1. The Status of General Principles in International Law

In addition to the two principle sources of international law, article 38(1)(c) ICJ Statute refers to ‘the general principles of law recognised by civilised nations’.³⁷³ Because the text of the article in question does not indicate any hierarchy, general principles formally rest on the same footing as treaty and custom. As Lord Phillimore observed during the *travaux préparatoires* of the PCIJ Statute, the predecessor of the ICJ Statute, ‘the order mentioned simply represented the logical order in which these sources would occur to the mind of the judge’.³⁷⁴ Further, the principles are ‘recognised’ by civilised nations, not enacted or consented by them. They are recognised by the virtue of their acceptance in major domestic legal systems, with state direct consent being immaterial. Moreover, the recognition is effected by ‘nations’, not by states, which means that the principles emerge through people’s practice within national borders. While the Statute does not give any definition of general principles and the ICJ’s pronouncements on the issue are rather tautological,³⁷⁵ scholars agree that these principles constitute the very fundament of the international legal order and reflect legal conscience of the international community. To illustrate, Lauterpacht defines ‘General Principles’ as:

[T]hose principles of law, private and public, which contemplation of the legal experience of civilized nations leads one to regard as obvious maxims of jurisprudence of a general and fundamental character [...] a comparison, generalization and synthesis of rules of law in its various branches — private and public, constitutional, administrative, and procedural — common to various systems of national law.³⁷⁶

According to Bin Chen, one of the most recognised scholars on the subject, general principles are ‘cardinal principles of the legal system, in the light of which international [...] law is to be interpreted and applied’.³⁷⁷ For

³⁷³ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute) art 38(1)(c).

³⁷⁴ Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-verbaux of the proceedings of the Committee, 16 June - 24 July 1920, with Annexes* (Van Langenhuyzen Brothers 1920).

³⁷⁵ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 14, 23 (The Court said that ‘the principles underlying the Convention are principles which are recognised by civilised nations as binding on States, even without any conventional obligation’).

³⁷⁶ Hersch Lauterpacht, *International Law Being the Collected Papers of Hersch Lauterpacht* (CUP 2009) 69, 74.

³⁷⁷ Bin Cheng, ‘The Meaning and Scope of Article 38(1)(c) of the Statute of the International Court of Justice’ (1952) 38 Grot Soc Trans 125, 132.

Schlesinger, general principles are ‘a core of legal ideas which are common to all civilized legal systems’.³⁷⁸ In words of Verzijl, general principles are ‘principles which are so fundamental to every well-ordered society that no reasonable form of co-existence is possible without their being generally recognized as valid’.³⁷⁹ For Sorensen, general principles are ‘le ciment qui assure le cohésion du droit international avec les ordres juridiques nationaux et qui permet de concevoir tous les phénomènes juridiques de l’humanité sous un aspect d’unité’.³⁸⁰ In the vein similar to other scholars, Lammers views general principles as ‘norms underlying national legal orders’ and as ‘the manifestation of the universal legal conscience’.³⁸¹ Likewise, Kolb describes general principles as ‘a sort of fire brigade *uti universi*, able to reinforce weak points of the law or to bridge gaps in any field and in any part of its body’.³⁸² Finally, Jalet designates general principles as ‘principles that constitute that unformulated reservoir of basic legal concepts universal in application, which exist independently of the institutions of any particular country and form the irreducible essence of all legal systems’.³⁸³

It is widely accepted that general principles of international law derive from broad plurality of developed domestic legal systems as well as international law in general. Concerning normative content, the concept of general principles encompasses: (a) fundamental principles of the international legal system (*pacta sunt servanda*, non-intervention, territorial integrity, self-defence and the legal equality of states); (b) legal principles discoverable by means of legal logic (the *lex specialis derogat legi generali* rule, the *lex posterior derogat priori* rule and the principle of *res judicata*); and (c) some ‘natural law’ principles (equity).³⁸⁴

Despite broad scholarly support and unequivocal legal foundations, general principles played minor role in international dispute settlements by the World Court and other international tribunals as well as were stripped of any autonomous significance in legal scholarship. They were used either as a subsidiary source to ascertain the meaning of a treaty and identify the existence of a customary norm, or they served as a general background against which

³⁷⁸ Rudolf B Schlesinger, ‘Research on the General Principles of Law Recognized by Civilized Nations’ (1957) 51 AJIL 734, 739.

³⁷⁹ Jan HW Verzijl, *International Law in Historical Perspective* (1968) 59, cited in Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (CUP 2011) 460.

³⁸⁰ Max Sorensen, ‘Principes de droit international public, Cours General’ (1960) 101 RCADI 1, 16.

³⁸¹ John G Lammers, ‘General Principles of Law Recognized by Civilized Nations’ in Frits Kalshoven, Pieter Jan Kuyper and Johann G Lammers (eds), *Essays on the Development of the International Legal Order in Memory of Haro F Van Panhuys* (Sijthoff & Noordhoff 1980) 57.

³⁸² Robert Kolb, ‘Principles as Sources of International Law (with Special Reference to Good Faith)’ (2006) 53 NILR 1, 31.

³⁸³ Frances TF Jalet, ‘The Quest for the General Principles of Law Recognized by Civilized Nations’ (1963) 10 UCLA L Rev 1041, 1044.

³⁸⁴ See Olufemi Elias and Chin Lim, ‘General Principles of Law, “Soft” Law and the Identification of International Law’ (1997) 28 Neth YBIL 4, 6.

‘primary’ sources were to be interpreted and understood.³⁸⁵ Such reluctance on the part of the World Court to avail itself of the third source can be explained by their vagueness and the fact that the Court would inevitably be obliged to use a large amount of discretion to derive concrete rights and obligations from them. This in turn can undermine the Court’s authority in the eyes of states, who established the Court to apply the existing rules of international law, not to create new ones. However, to distinguish principles from treaty or custom on the basis that they are more general and less precise and, most importantly, non-consensual is erroneous and even absurd. As the ILC noted, ‘the fact that article 31(3)(c) was rarely expressly cited should not obscure its importance as a rule of treaty interpretation’.³⁸⁶ Indeed, general principles are frequently invoked by individual judges of the Court as well as attract broad scholarly support. As to the non-consensual nature of general principles, it has been written that

Recourse to principles of domestic law, even if they have not yet become ‘internationalized’ by custom or treaty, does not derogate from the principle of consent. It is a source available only as necessary for interstitial use, to fill out what international law requires but has not recognized as customary law because it has not yet been invoked often and widely enough, and it is too cumbersome for the system to negotiate by multilateral treaty. General consent is properly assumed.³⁸⁷

The consensual nature of general principles is also acknowledged by Alston and Simma:

In contrast to [...] natural law views, the recourse to general principles [...] remains grounded in a consensualist conception of international law. Consequently, what is required for the establishment of human rights obligations qua general principles is essentially the same kind of convincing evidence of general acceptance and recognition [...] in order to arrive at customary law. However, this material is not equated with state practice but is rather seen as a variety of ways in which moral and humanitarian considerations find a more direct and spontaneous ‘expression in legal form’.³⁸⁸

³⁸⁵ Cherif M Bassiouni, ‘A Functional Approach to “General Principles of International Law”’ (1990) 11 Mich J Int’l L 768, 792, 800; Alain Pellet, ‘Article 38’ in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2006) 677, 780; Ciaran Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013) 205-06; Hugh Thirlway, *The Law and Procedure of the International Court of Justice*, vol 1 (OUP 2013) 232 (‘No decision of the Court, or indeed of the Permanent Court, has yet been based explicitly upon a principle or rule of law drawn from the “general principles of law recognised by civilised nations”’).

³⁸⁶ ILC, ‘Report of the International Law Commission on the Work of Its 56th Session’ (3 May—4 June and 5 July—6 August 2004) UN Doc A/59/10, para 349.

³⁸⁷ Louis Henkin, *International Law: Politics and Values* (Brill 1995) 40.

³⁸⁸ Bruno Simma and Philip Alston, ‘The Sources of Human Rights Law: Custom, Jus Cogens and General Principles’ (1989) 12 Aust YBIL 82, 102.

Judge Fernandes in his dissenting opinion similarly underlined the importance of the recognition of the positive underpinnings of general principles of international law:

Whatever view may be held in regard to these principles, whether they are considered to be emanations of natural law or to be rules of custom, or constitutional principles of the international legal community, or principles directly deduced from the concept of law, or principles agreed to by States because they are members of a legal family, whatever, I say, may be the attitude of each towards the origin and basis of these principles, all agreed in accepting their existence and their application as a *source of positive law*.³⁸⁹

Ellis has astutely concluded that general principles of law recognised by civilised nations are, akin to treaty and custom, positivist both on formalist and voluntarist grounds. They are formalist, that is formal sources of law for the purposes of adjudication at the ICJ, by virtue of being enshrined in the ICJ Statute, and for states by virtue of international customary law permitting reception into international law of principles widely recognised in municipal laws.³⁹⁰ As Fitzmaurice opined, state parties to the Statute have ‘duly consented to the application of those principles by the Court’.³⁹¹ They are voluntarist ‘provided that the rule in question is anchored in a sufficiently large number of domestic legal systems as to be essentially universal [...] which serves as a proxy for state consent’.³⁹² Moreover, general principles may be unearthed not only from municipal legal systems but also from the international context that entails state conduct, treaties, collective declarations, policies and pronouncements at the international level, scholarly writings, international case law and international custom.³⁹³ Needless to say, in this case evidence of state consent is even more robust. To neglect such an important source of law is to fail to decide ‘in accordance with international law’. One should also bear in mind the fact that the binding force of ‘real’ sources, such as treaty and custom, is based on the fundamental principles of *pacta sunt servanda*, good faith, estoppel and other principles. Remarkably, for Lauterpacht, the resort to general principles of law has evolved into the international customary norm:

³⁸⁹ *Case Concerning Right of Passage over Indian Territory (Portugal v India)* (Merits) [1960] ICJ Rep 6, Dissenting Opinion of Judge Fernandes, 136-37, para 35 (emphasis added).

³⁹⁰ Jaye Ellis, ‘General Principles and Comparative Law’ (2011) 22 EJIL 949, 953-55.

³⁹¹ Gerald Fitzmaurice, ‘The Future of Public International Law and of the International Legal System in the Circumstances of Today’ (Institut de droit international, Special Report, 1973) 130 (Even though he acknowledged that they constitute ‘a separate source of international law independent of the specific consent of States’).

³⁹² Jaye Ellis, ‘General Principles and Comparative Law’ (2011) 22 EJIL 949, 953-55.

³⁹³ Cherif M Bassiouni, ‘A Functional Approach to “General Principles of International Law”’ (1990) 11 Mich J Int’l L 768, 789.

[T]here is a customary rule of international law to the effect that the actual will of States as evidenced by custom and treaty may, when necessary, be supplemented by such rules and principles as correspond to the nature of the legal relations between them, to rule of justice, and to the general principles of law [...].³⁹⁴

Furthermore, the way principles differ from more concrete legal rules is not that of substance but the one of degree: when states cannot reach a consensus upon definite and rigid standards of behaviour because of the complexity of the issue or high political stakes but need, nonetheless, some basic framework to navigate in otherwise anarchical ‘waters’ of international politics, they may be prone to agree on principles or accept them by means of acquiescence. On this account, principles are a typical tool for the ever-complex and globalised society, whereas in the Westphalian world precise contract-like obligations prevailed. This is not to say that general principles did not feature in the ‘pre-constitutionalised’ order but that the international legal system in the process of constitutionalisation provides for the necessary prerequisites for their full application and legal impact.

Another reason why general principles have not fared well as an autonomous source of international law is related to uncertainties as to their identification. All too often it is difficult to ascertain whether a general principle exists, particularly considering a great variety of approaches applied in municipal legal systems with regard to specific legal issues. Many legal commentators have attempted to fill this scholarly void. Bassiouni has, for instance, suggested a ‘functional approach’ to identify general principles of law flowing from various national legal systems that assumes the employment of empirical methodology, which is substantially similar to the one used to ascertain the existence of a customary rule of international law.³⁹⁵ Burke, instead, came up with a three-tools strategy to ascertain general principles of law beyond what the World Court has dealt with.³⁹⁶ First, he proposed to follow the logic of the World Court (the PCIJ and ICJ), since the logic used in the discovery of one principle is presumed sufficient to unearth another one. Secondly, instead of looking into all national systems of the world to find a principle common to all nations it is enough to look into the national jurisdiction of ‘States with developed legal systems’ referred to as ‘civilised nations’ in article 38(1)(c). Finally, so runs the argument, one has to focus on principles that transcend all or nearly all developed systems of law: ‘[T]he correct test would seem to be that an international judge before taking over a principle from private law must satisfy himself that it is recognized in

³⁹⁴ Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Archon Books 1927) 298-99.

³⁹⁵ Cherif M Bassiouni, ‘A Functional Approach to “General Principles of International Law”’ (1990) 11 *Mich J Int’l L* 768, 809-11.

³⁹⁶ Ciaran Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013) 241-43.

substance by all the main systems of law, and that in applying it he will not be doing violence to the fundamental concepts of any of those systems'.³⁹⁷

The study of a more recent literature thus reveals the rising interest in general principles as a self-standing legal source.³⁹⁸ As was succinctly observed by Burke, general principles have become the “elephant in the room” of international law, something which is undoubtedly important, but which most scholars choose to ignore because to deal with it would be too difficult, too controversial, or too taboo'.³⁹⁹ While he ostensibly followed a traditional positivist trajectory in chartering the equitable foundations for humanitarian intervention, it is possible to discern constitutionalist overtones throughout his work. In what follows, I shall attempt to chart several equitable principles having bearing on the right to democracy by drawing on the work of Burke.

4.4.2. Equity

Before moving to the examination of equitable principles that constitute a legal foundation for the right to democracy, it is of avail to ascertain first what equity means and what place it holds in international law. Equity, or equitable principles, constitutes a sub-set of general principles of law, whose particular relevance for the present undertaking is justified by its overwhelming acceptance in domestic legal systems and its universal existence in some form or another amongst various national orders, what has been even labelled as ‘a hallmark of “civilised” legal systems’.⁴⁰⁰ In the context of the sources of international law, the word ‘equity’ takes on different meanings. It can (a) aim at correcting extant legal rules and thus be perceived as an antithesis to law in the sense of ‘*ex aequo et bono*’, commonly defined as ‘according to what is equitable and good’,⁴⁰¹ as provided in article 38(2) ICJ Statute (equity *contra legem*); or (b) fill the lacunae of international law to avoid the situations of a

³⁹⁷ Harold C Gutteridge, *Comparative Law* (2nd edn, CUP 2015) 65.

³⁹⁸ See eg Benedict Kingsbury and others, ‘The Emergence of Global Administrative Law’ (2005) 68 NYU JL & Contemp Prob 15; Nicholas Tsagourias, ‘The Constitutional Role of General Principles of Law in International and European Jurisprudence’ in Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (CUP 2007) 76; Armin von Bogdandy, ‘General Principles of International Public Authority: Sketching a Research Field’ (2008) 9 Germ LJ 1909; Fabian O Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff 2008); Jaye Ellis, ‘General Principles and Comparative Law’ (2011) 22 EJIL 949, 954; Ciaran Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013); Beatrice I Bonafe and Paolo Palchetti, ‘Relying on General Principles in International Law’ in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar Publishing 2016).

³⁹⁹ Ciaran Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013) 287.

⁴⁰⁰ *ibid* 200.

⁴⁰¹ Bryan A Garner, *Black’s Law Dictionary* (7th edn, West Group 1999) 581.

non-liquet (equity *praeter legem*); or (c) be perceived as an inherent attribute of legal rules (equity *infra legem*); or (d) make up the very content of legal rules (equity *intra legem*).⁴⁰² Importantly, some scholars distinguish between equity *contra legem* as a legal principle and the situations *ex aequo at bono*, where the Court may be given a discretionary power by the parties to the dispute to go beyond what law says in a particular legal situation to avoid unjust result.⁴⁰³ Yet, for others, equity manifests itself in both cases: in the former case it is part and parcel of any modern system of administration of justice, while in the latter case it is equivalent to ‘fairness’, ‘morality’ and ‘justice’ as the concept is applied in English legal system.⁴⁰⁴ The present work maintains this distinction.

Some authors claim that even though equity plays a certain role in the reasoning of the World Court, it is not a legal (formal) source *per se*. It transcends legal rules, shapes their ramifications, widens their scope and sometimes directly impacts the rule’s content but without being a formal source of itself.⁴⁰⁵ Others insist that by virtue of its flexibility, its underlying role in softening the rigour of strict rules and its strive towards fairness, it is fair to maintain that equity makes up the corpus of general principles of law recognised by civilised nations, that is the third source of law.⁴⁰⁶ To illustrate, in *Diversion of Water from the Meuse*, the case dubbed by Jenks as international equity’s ‘*locus classicus*’,⁴⁰⁷ Judge Hudson in his individual opinion upheld that ‘[w]hat are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals’. He also added that ‘[a] sharp division between law and equity, such as prevails in the administration of

⁴⁰² Alain Pellet, ‘Article 38’ in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2006) 677, 723.

⁴⁰³ See eg Christopher R Rossi, *Equity and International Law: A Legal Realist Approach to International Decision Making* (Transnational Publishers 1993) 9-10; Anastasios Gourgourinis, ‘Delineating the Normativity of Equity in International Law’ (2009) 11 Int’l CL Rev 327, 332; Ciaran Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013) 100; Hugh Thirlway, *The Law and Procedure of the International Court of Justice*, vol 1 (OUP 2013) 44-45.

⁴⁰⁴ Wolfgang Friedmann, ‘The Uses of General Principles in the Development of International Law’ (1963) 57 AJIL 279, 288. For various definitions of equity, see Francesco Francine, ‘Equity in International Law’ in *Max Planck Encyclopedia of Public International Law* (OUP 2013).

⁴⁰⁵ Lester B Orfield, ‘Equity as a Concept of International Law’ (1930) 18 Ky LJ 31, 127 (‘[E]quity is a mode of application of the law rather than a source of law itself’); Michael Akehurst, ‘Equity and General Principles of Law’ (1976) 25 ICLQ 801, 807; Alain Pellet, ‘Article 38’ in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2006) 677, 730; Francesco Francine, ‘Equity in International Law’ in *Max Planck Encyclopedia of Public International Law* (OUP 2013).

⁴⁰⁶ Ciaran Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013) 204.

⁴⁰⁷ Clarence W Jenks, *The Prospects of International Adjudication* (Steven and Sons 1964) 322.

justice in some States, should find no place in international jurisprudence'.⁴⁰⁸ While it is a separate opinion and thus not constituting a part of the Court's judgment, it is nonetheless important for understanding underlying logic lying behind the Court's relatively hazy exposition of arguments. Moreover, the fact that the Judge Hudson's position has been challenged neither by his fellow judges nor in the subsequent decisions of the World Court implies the general acceptance of equitable principles as forming corpus of general international law on par with other legal sources.⁴⁰⁹ In fact, the ICJ not only refrains from questioning the legal normativity of equity, but also explicitly endorses it:

Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles.⁴¹⁰

On another occasion, the Court similarly held that

Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it. In the course of the history of legal systems the term 'equity' has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law.⁴¹¹

Yet, other quarters of the scholarly community take a middle-ground position by claiming that given its inherent vagueness, it is not equity as such that is a general principle but rather certain equitable principles that are widely recognised across various *foro domestico* and can qualify as general principles of law recognised by civilised nations for the purposes of article 38.⁴¹² This last position finds partial explanation in the widely recognised trend among international judges to invoke a certain principle without much elaboration as to its origin. The author of the present work aligns with this last position as it allows to preserve the nature of international law as both normative

⁴⁰⁸ *Diversion of Water from the Meuse* (Merits) PCIJ Rep Series A/B No 70, Individual Opinion by Mr Hudson, 76.

⁴⁰⁹ Ciaran Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013) 214.

⁴¹⁰ *North Sea Continental Shelf Cases* (*Federal Republic of Germany v Netherlands; Federal Republic of Germany v Denmark*) (Merits) [1969] ICJ Rep 3, para 85.

⁴¹¹ *Case Concerning the Continental Shelf* (*Tunisia v Libyan Arab Jamahiriya*) (Merits) [1982] ICJ Rep 18, para 71. See also *Case Concerning the Continental Shelf* (*Libyan Arab Jamahiriya v Malta*) (Merits) [1985] ICJ Rep 13, para 45; *Case Concerning the Frontier Dispute* (*Burkina Faso v Republic of Mali*) (Merits) [1986] ICJ Rep 554, para 149.

⁴¹² Margaret White, 'Equity — A General Principle of Law Recognized by Civilized Nations?' (2003) 4 QLJ 103, 109.

(constraining state actions) and concrete (the constraining power of international law flows from state consent). On this view, equity presents itself as a ‘material’ source of international law, that is a source from which equity derives its matter, not validity, whilst certain equitable principles which are accepted in majority of national legal systems are formal sources of international law. By virtue of their explicit enshrinement in article 38(1)(c) ICJ Statute, they are binding on all subjects of international law irrespective of treaties and custom.

Given the increasing inter-dependence between states and consequently increasing assimilation of various legal systems, it comes as no surprise that national jurisdictions have developed analogous principles throughout the world. As Burke astutely noted, ‘[i]f a legal system of a civilized nation resists equity’s influence, respect for the legal system will, in the long term, diminish and collapse, and it will cease to be a legal system, or the citizens will revolt against it’.⁴¹³ It means that legitimacy of every legal system depends on its acceptance of equity in one form or another in order to obviate injustice and abuse of law. Which are then these equitable principles? Albeit it is clear that general principles of law recognised by civilised nations encompass a wide range of principles accepted by the majority of national jurisdictions, the objective test for finding these principles is yet to be invented. *Ergo*, in order to avoid inherently subjective picking up of principles ‘out of thin air’,⁴¹⁴ the recourse will be made solely to principles that manifested themselves in the jurisprudence of the PCIJ and the ICJ.

4.4.2.1. Good Faith

There scarcely are scholars who would not regard good faith as the most fundamental principle of international law.⁴¹⁵ Apart from being present in all developed national jurisdictions as well as endorsed by states in a variety of international instruments, the most obvious of which is the VCLT, the principle of good faith makes its influence felt in all areas of international law. In the ‘Century of the Treaty’, where the amount of treaties skyrocketed to the number of over 200,000 documents published in over 2,800 volumes of the UN Treaty Series,⁴¹⁶ with the number of non-treaty commitments being at the

⁴¹³ Ciaran Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013) 202.

⁴¹⁴ *ibid* 297.

⁴¹⁵ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2nd edn, CUP 1994) 105; Robert Kolb, *La bonne foi en droit international public: Contribution à l’étude des principes généraux de droit* (Presses Universitaires de France 2000) xxxviff; Ciaran Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013) 299. See also *Case Concerning the Loan Agreement between Italy and Costa Rica* (Arbitration Tribunal) (1998) XXV RIAA 21, para 14 (The Court referred to the fundamental character of the principle of good faith in international law).

⁴¹⁶ United Nations Treaty Collection
<https://treaties.un.org/Pages/LatestVolumes.aspx?clang=_en> accessed 24 May 2017.

very least double, the principle of good faith in the form of the doctrine of *pacta sunt servanda* is of such a paramount importance that without this principle 'international law [...] would be a mere mockery'.⁴¹⁷ Cheng also notes that 'by infusing such qualities as honesty, sincerity, reasonableness and moderation into the exercise of rights, [the principle of good faith] promotes the smooth and proper functioning of the legal system'.⁴¹⁸ Good faith is, thus, a constitutional principle, a 'Verfassungsgrundsatz der Völkerrechtsgemeinschaft' in the words of Dahm,⁴¹⁹ as it aims at mitigating destructive consequences of state sovereignty and its attendant principles, such as non-interference into the domestic affairs of states and inalienability of state consent, in the international community in an ever-growing need of cooperation. A number of eminent national and international judgments have upheld the principle.⁴²⁰ Moreover, the principle of *bona fides* has never been challenged by any party to the dispute before the World Court.

In treaty interpretation, the importance of good faith is difficult to overstate. Even though the general rule of interpretation enshrined in article 31 VCLT is too simplistic and too complex at the same time given its susceptibility to quite contradictory interpretations, one essential rule of interpretation is ever present, namely the rule of interpretation in good faith.⁴²¹ It is in following considerations of good faith that one accords priority to a certain interpretative element: ordinary meaning, context or object and purpose.⁴²² That said, there is a strong link between the principle of good faith and the right to democratic governance. As was set out previously, states committed themselves to uphold democracy in a variety of binding instruments, the most prominent of which is article 25 ICCPR. Not only does the article encompass a bundle of procedural democratic elements, such as the right to vote, to stand for election and to occupy public office, but considerations of good faith require one to read into the article more substantive elements, such as political pluralism, equality, the rule of law and respect for human rights. It means that states failing to hold elections in line with these standards and otherwise undermining the establishment and/or consolidation of democratic form of government are acting *mala fides*. Bad faith exercised by the recalcitrant state is a breach of a general principle of law. In other words, when states violate the right of their citizens to, say, vote in free, fair and multiparty elections, not only does this amount to violation of the

⁴¹⁷ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2nd edn, CUP 1994) 113.

⁴¹⁸ *ibid* 136.

⁴¹⁹ Georg Dahm, *Völkerrecht*, vol 1 (De Gruyter Recht 1958) 192.

⁴²⁰ See eg *Metzger & Co (United States v Haiti)* [1901] USFR 262, 271; *Venezuelan Preferential Claims (German Empire, United Kingdom and Italy v Venezuela et al)* [1904] Scott Hague Court 55, 60; *Lighthouses Case (France v Greece)* (Merits) PCIJ Rep Series A/B No 62, 34; *Diversion of Water from the Meuse* (Merits) PCIJ Rep Series A/B No 70, 4, para 2; *North Sea Continental Shelf Cases (Federal Republic of Germany v Netherlands; Federal Republic of Germany v Denmark)* (Merits) [1969] ICJ Rep 3, para 85.

⁴²¹ Patrick Daillier and others, *Droit International Public* (8th edn, LGDJ 2009) 283.

⁴²² *ibid*.

norms of treaty law or customary law, but this also involves a breach of the general principle of good faith. This also holds true the other way around: the violation of the principle of good faith is tantamount to a breach *stricto sensu* of said agreement. As Cheng opines, '[i]n short, good faith requires that one party should be able to place confidence in the words of the other'.⁴²³ Every right stands for the protection of a legal interest. Any exercise of such right 'not in furtherance of such interest, but with the malicious purpose of injuring others can no longer claim the protection of the law. *Malitiis non est indulgendum* [indulgence is not to be shown to the malicious desires of men]'.⁴²⁴ Thus, any state who joined the ICCPR's system to elevate their political image without a genuine commitment to act accordingly is acting *mala fides* vis-à-vis the Covenant, which is tantamount to an effective and material breach of the Covenant.

On the other side of the coin, when a state undertakes binding obligations by subscribing to international treaty, such as, for instance, the ICCPR, to reassert its political standing without any actual intention to follow the treaty provisions, its action can be characterised as *abus de droit*, which forms part of the broader conception of good faith.⁴²⁵ This follows from the principle of *sic uteri tuo ut alienum non laedas*, meaning that one should so use one's own property as not to injure other people. Thus, whenever a state becomes a party to a treaty, its people as well as the international community at large put trust into the fact that the state concerned will adhere to the said treaty. In failing to meet such expectations, the state in question commits a breach of faith concerning the assurances previously offered, including the obligation to democratise.

Moreover, having established that soft law instruments, as a reflection of *opinio juris* for the purposes of establishing the existence of customary law and as a self-standing source of law, lay out more elaborate guidance on how states are expected to go about their democratic policies, including the prohibition of democratic interruptions through military coups and other extra-constitutional encroachments, it is fair to contend that by reneging on their 'soft' undertakings states also act in bad faith. The *Nuclear Tests Case* is but one example where the Court, faced with the necessity to inscribe concrete legal obligations into a soft instrument (unilateral declaration), found support in the principle of legitimate expectations, one of the aspects of good faith:

⁴²³ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2nd edn, CUP 1994) 108.

⁴²⁴ *ibid* 122.

⁴²⁵ See *Anglo-Norwegian Fisheries Case (United Kingdom of Great Britain and Northern Ireland v Norway)* (Merits) [1951] ICJ Rep 116, 142. For a fuller account of various aspects of the principle of good faith, see Robert Kolb, *La bonne foi en droit international public: Contribution à l'étude des principes généraux de droit* (Presses Universitaires de France 2000) 143ff, 179ff; Robert Kolb, 'Principles as Sources of International Law (with Special Reference to Good Faith)' (2006) 53 NILR 1, 18.

One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.⁴²⁶

As Boyle pointedly insisted, while the majority of scholarly community is still sceptical as to their legal validity, non-treaty instruments are often carefully negotiated and intended to have some normative significance: ‘There is at least an element of good faith commitment, evidencing in some cases a desire to influence state practice or expressing some measure of law-making intention and progressive development’.⁴²⁷ It may be consequently submitted that the failure to live up to ‘soft law’ commitments may also entail the breach of the principle of good faith.

4.4.2.2. Estoppel

Another general principle of law relevant for the democratic entitlement is estoppel, also known as *non concedit venire contra factum proprium* (no one may set himself in contradiction to his own previous conduct). In a nutshell, it can be reduced to an idea that actors are to be held accountable for the promises they make. In words of Cheng, it is pursuant to a principle of good faith that ‘a man shall not be allowed to blow hot and cold — to affirm at one time and deny at another [...]. Such a principle has its basis in common sense and common justice, and whether it is called “estoppel”, or by any other name, it is one which courts of law have in modern times most usefully adopted’.⁴²⁸

At its simplest, the major rationale behind the principle of estoppel is to ensure consistency in what states say and do and to guarantee thereby a measure of stability in their legal relations. Thus, the tripartite test for estoppel is based on: (1) an *assurance* provided by one party; (2) *reliance* on that assurance by another party; and (3) *detriment* occurred to another party on foot of this reliance.⁴²⁹ The principle originated in the Anglo-Saxon legal tradition

⁴²⁶ *Nuclear Tests Case (Australia & New Zealand v France)* (Merits) [1974] ICJ Rep 457, para 49. See also *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, para 60 (Also referring to the above case).

⁴²⁷ Alan Boyle, ‘Soft Law in International Law-Making’ in Malcolm D Evans (ed), *International Law* (OUP 2010) 124-25.

⁴²⁸ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2nd edn, CUP 1994) 141-42.

⁴²⁹ Ciaran Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013) 310. See also Robert Kolb, *La bonne foi en droit international public: Contribution à l'étude des principes généraux de droit* (Presses Universitaires de France 2000) 362ff.

and was only partially integrated into international law. However, because it is present in all systems of private law, it is logical to extrapolate it into the domain of inter-state relations.⁴³⁰ In the words of Kolb, '[c]e principe qu'il est possible de décrire sommairement comme celui d'une non-contradiction qualifiée, est à proprement parler universel car il correspond à une conception fondamentale du droit'.⁴³¹ MacGibbon suggests that the underlying rationale of the doctrine of estoppel lies 'in the continuing need for at least a modicum of stability and for some measure of predictability in the pattern of State conduct'.⁴³² He also characterised it as a natural and inherent complement to *pacta sunt servanda*, which on his view constitutes the cornerstone of the international legal system.⁴³³ For Burke, the doctrine of estoppel is 'the epitome of equitable doctrines crafted to secure adherence to the idea of good faith and honorable conduct *inter partes*'.⁴³⁴ The World Court had an opportunity to pronounce on this principle in some of its judgments.⁴³⁵ In the *Chorzow Factory* case, the PCIJ ruled that:

[I]t is [...] a principle generally accepted in the jurisprudence of international arbitration [...] that one party cannot avail itself of the fact that the other has not fulfilled some obligation, or has not had recourse to some means of redress, if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.⁴³⁶

In *Temple of Preah Vihear*,⁴³⁷ commonly cited as the most important modern case of application of the doctrine of estoppel on the international plane, the Court applied the principles of acquiescence and estoppel to protect the boundary between Thailand and Cambodia, which albeit had been drawn by error, was not challenged by Siam authorities for a long period of time. As a

⁴³⁰ Hersch Lauterpacht, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)* (Longman 1927) 204-05.

⁴³¹ Robert Kolb, *La bonne foi en droit international public: Contribution à l'étude des principes généraux de droit* (Presses Universitaires de France 2000) 357.

⁴³² Iain C MacGibbon, 'Estoppel in International Law' (1958) 7 ICLQ 468, 468-69.

⁴³³ Iain C MacGibbon, 'The Scope of Acquiescence in International Law' (1954) 31 Brit YBIL 143, 181-82.

⁴³⁴ Ciaran Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013) 310.

⁴³⁵ *Case Concerning the Factory at Chorzow (Claim for Indemnity)* [Jurisdiction] [1928] PCIJ Rep Series A No 9, 31; *Case Concerning the Payment of Various Serbian Loans Issued in France and Case Concerning the Payment in Gold of the Brazilian Federal Loans Issued in France* (Merits) PCIJ Series A No 20/21, 38-39; *Legal Status of Eastern Greenland (Denmark v Norway)* (Merits) PCIJ Rep Series A/B No 53, 62; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* (Merits) [1984] ICJ Rep 246, 305; *Anglo-Norwegian Fisheries Case (United Kingdom of Great Britain and Northern Ireland v Norway)* (Merits) [1951] ICJ Rep 116; *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Merits) [1997] ICJ Rep 7.

⁴³⁶ *Case Concerning the Factory at Chorzow (Claim for Indemnity)* [Jurisdiction] [1928] PCIJ Rep Series A No 9, 31.

⁴³⁷ *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6.

result, the Court held that Thailand acquiesced to the boundary and was estopped from altering it. It follows that estoppel is closely linked to the idea of acquiescence for it can also arise by the virtue of a state's implicit acceptance (estoppel by silence) in addition to a specific assurance.⁴³⁸

There is, thus, ample evidence that the principle of estoppel is deeply ingrained into the architecture of international law. Since the principle is an adjunct to good faith, and particularly to its *pacta sunt servanda* component, it comes as no surprise that it bears on the present discussion. It is fair to suggest that whenever state consents to be bound by a treaty or accepts, whether explicitly or tacitly, a norm of customary law as binding, or continuously expresses its conviction about the importance of a particular issue by means of soft law instruments, it creates legitimate expectations that its conduct will be in line with the rule in question. If the state concerned for some reason repudiates its commitment it inflicts detriment on other states as well as its own citizens. For instance, it is a common practice within the confines of the UN and other regional organisations to monitor election practices in states willing to embark upon democratic path. Whenever the international organisation upon the request of the incumbent government monitors the latter's elections and subsequently recognises the result of elections as fair and in accordance to international standards, the government in questions creates expectations that all relevant stakeholders including itself will abide by the election outcome. Should this expectation be frustrated, the international community may undertake an action, as it did in Haiti, to restore the legitimate government whose election it was monitoring. In such way, the transgressor state is legally precluded, or estopped, from denying the original assurance given. It is here that another equitable principle comes into play, namely *ubi ius, ubi remedium*, meaning that for every wrong committed there must be an adequate remedy. Whenever it is established that a state is reneging on its human rights obligations, or assurances, and where the compliance cannot be vindicated through diplomatic channels, failure to ensure remedy will strip the doctrine of estoppel of any meaningful use. Burke mapped the principle so well that there is no need to reiterate his findings here.⁴³⁹ It suffices to mention that in case when democratic government is toppled by military coup or by the employment of other anti-constitutional means, that is when a state is reneging upon its assurances to ensure every citizen the right to political participation, it is held to be estopped from denying its assurances, and the citizens of the state in question shall have recourse to remedy. Since the state in issue is incapable of providing remedy given the absence of legitimate government, it is the international community as a whole that has to react to effectuate the international estoppel, whether by means of diplomatic, economic and political

⁴³⁸ The principle of acquiescence by inaction also plays a decisive role in judicial reasoning in the *Anglo-Norwegian Fisheries Case (United Kingdom of Great Britain and Northern Ireland v Norway)* (Merits) [1951] ICJ Rep 116, 136-37; *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v Nicaragua)* [1960] ICJ Rep 192, 210-13.

⁴³⁹ Ciaran Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013) 302-09.

sanctions, or, in the most extreme case, by means of military force. Another possibility would be the grass-root forcible action against the incumbent government by means of revolution.⁴⁴⁰

4.4.2.3. Acquiescence

One would barely object that negative duties, that is duties to refrain from committing certain acts, are more prominent in any legal system, including international law, than positive duties, that is duties requiring certain affirmative action to be regarded as fulfilled. Hence, the duty to protest or to undertake another positive measure to ensure ones established rights is not to be regarded as a *prima facie* condition for maintaining these rights. Yet, a certain type of situations may warrant an effective action to affirm the validity of one's established rights and the failure to act, or acquiescence, may compromise one's rights if the other party has been misled by that party's silence.⁴⁴¹ In fact, international law as a system lacking a compulsory mechanism of authoritative judicial ascertainment of the legality of new practices and forms of conduct is a fertile ground for the incorporation of acquiescence in the form of silence or the failure to protest as its underlying principle. Whilst acquiescence emerged in the Anglo-American legal tradition, it was transposed onto the international realm through a number of judicial and arbitral decisions⁴⁴² as well as scholarly writings and, as a result, it acquired its autonomous meaning that goes well beyond its domestic precursor's ramifications.

Acquiescence, expressed by the maxim *qui tacet consentire videtur si loqui debuisset ac potuisset* (he who keeps silent is held to consent if he must and can speak), is an equitable principle in which, akin to other above-mentioned principles, considerations of good faith and equity are central. Its main goal is to mitigate injustices flowing from the rigid application of positive law as well as to temper the stagnation effect of positivism, since a blind reliance on state consent for a new norm to arise might prove to be a significant impediment to the development of international law. Acquiescence may also facilitate the development of customary international law since 'general

⁴⁴⁰ See section 6.3.5 of this thesis.

⁴⁴¹ Derek W Bowett, 'Estoppel Before International Tribunals and Its Relation to Acquiescence' (1957) 33 Brit YBIL 176, 198. See also Iain C MacGibbon, 'The Scope of Acquiescence in International Law' (1954) 31 Brit YBIL 143, 143.

⁴⁴² *Grisbadarna Case (Norway v Sweden)* [1910] 4 AJIL 226, 233-34; *Tinoco Concessions Arbitration (United Kingdom v Costa Rica)* [1924] 18 AJIL 147, 153-57; *The Case of the S.S. 'Lotus' (France v Turkey)* (Merits) [1927] PCIJ Series A No 10, 18-31; *Palmas Island Arbitration (United States of America v Netherlands)* (1928) 2 RIAA 829, 866-69; *Anglo-Norwegian Fisheries Case (United Kingdom of Great Britain and Northern Ireland v Norway)* (Merits) [1951] ICJ Rep 116, 134-39; *Right of Passage over Indian Territory Case (Portugal v India)* (Merits) [1960] ICJ Rep 6, 39-44; *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6, 27-33; *Continental Shelf Arbitration (France v United Kingdom)* (1978) 18 RIAA 3, 68-74; *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras: Nicaragua intervening)* (Merits) [1992] ICJ Rep 351, 401-09, 566-70.

toleration by the international community may lend support to an emerging customary rule'.⁴⁴³ Acquiescence has equally closely-knit relations with estoppel: 'Acquiescence produces an estoppel in circumstances when good faith would require that the State concerned should take active steps of some kind in order to preserve its rights of freedom of action'.⁴⁴⁴ In this sense, acquiescence can be viewed as a particular form of estoppel, that is 'estoppel by silence', 'by inaction' or 'by abstention'. In the *Anglo-Norwegian Fisheries* case, in which Britain objected against the Norwegian expansion of its territorial sea, the Court laid emphasis on the absence of protests against the Norwegian claims: 'The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom'.⁴⁴⁵ In other words, the Court raised the acquiescence of Great Britain as an estoppel against her. Similar reasoning is visible in the *Temple of Preah Vihear* case, in which the Court relied on Thailand's silence as a preclusion to deny the validity of the border settlement with Cambodia.⁴⁴⁶ However, one should not confuse the two principles. Whilst acquiescence must be manifested by the community at large, estoppel is applicable *inter partes*.⁴⁴⁷ Secondly, estoppel presupposes the existence of a *dommage*, whereas acquiescence lacks this requirement. Thirdly, acquiescence is only manifested through passive behaviour, whereas estoppel can include both passive and active elements. Fourthly, the requirement of a lapse of time is more acute for acquiescence than for estoppel.⁴⁴⁸ Lastly, acquiescence signals an expression of consent, whereas there is not such a requisite for estoppel to arise.⁴⁴⁹ Only in a limited type of circumstances, such as, e.g., boundary disputes as the above-mentioned cases demonstrate, is the difference between the two negligible. For acquiescence to arise, two conditions shall be met: (1) the acquiescing state should be aware of

⁴⁴³ Nuno Sergio Marques Antunes, 'Acquiescence' in Rediger Wolfram (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, OUP 2012) 55.

⁴⁴⁴ Georg Schwarzenberger, 'The Fundamental Principles of International Law' (1955) 87 RCADI 195, 256.

⁴⁴⁵ *Anglo-Norwegian Fisheries Case (United Kingdom of Great Britain and Northern Ireland v Norway)* (Merits) [1951] ICJ Rep 116, 139.

⁴⁴⁶ *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6, 32.

⁴⁴⁷ Derek Bowett, 'Estoppel before International Tribunals and Its Relation to Acquiescence' (1957) 33 Brit YBIL 176, 200.

⁴⁴⁸ See Robert Kolb, *La bonne foi en droit international public: Contribution à l'étude des principes généraux de droit* (Presses Universitaires de France 2000) 387ff.

⁴⁴⁹ Nuno Sergio Marques Antunes, 'Acquiescence' in Rediger Wolfram (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, OUP 2012) 56-57. The ICJ attempted to clarify the issue in *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* (Merits) [1984] ICJ Rep 246, 305, para 130 (Acquiescence and estoppel are 'based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion. According to one view, preclusion is in fact the procedural aspect and estoppel the substantive aspect of the same principle').

the situation it acquiesces to and (2) certain lapse of time is required before acquiescence can emerge.⁴⁵⁰

Inasmuch as acquiescence facilitates the emergence of new legal norms without directly invoking individual state consent, it can be regarded as an effective means of constitutionalisation of international law. The community values that are reflected in human rights, which are enshrined in international human rights treaties, enjoy strong international support and states are unwilling to compromise their political standing by persistently objecting to these norms. If they do not object they can be considered bound by these norms by virtue of acquiescence. Whilst it is not universally accepted that democracy is now a universal human right, it is neither explicitly objected thereto. Indeed, no modern authoritarian regime is capable of universal ideological assault on liberal democracy. Their stance in international community is defensive.⁴⁵¹ Whenever these regimes face a need to legitimise their power they claim representing a particular type of democracy, such as, e.g., a communist regime's claim to be a proletarian democracy, an Africa one-party state's claim to be an 'African democracy' and Asian states' claim to be democracy carved by 'Asian values'. Because the consolidation of a norm occurs whenever violators attempt to justify their actions within the framework of the norm or object ever violating it,⁴⁵² it is fair to suggest that the commitment to democracy is now a legal norm.

The above-mentioned calls for non-Western varieties of democracy are nevertheless regraded by some commentators as a manifestation of the legitimacy crisis of Western liberal democracy.⁴⁵³ They appeal to poor performance of modern democracies characterised by their inability to address popular interests, to defeat corruption and to provide for a workable political framework for fragile states.⁴⁵⁴ Yet, the author of this work contends that even if the Western liberal democracy as an institutional project might be in crisis, the idea of democracy as a right to equality and empowerment in domestic political process is ever universally shared. Moreover, to turn the argument upside down, the very fact that new models of democracy are being shaped to suit local particularities strengthens the democratic thesis because not only is there no objection to democracy as a right (calls for non-Western types of democracy are not a cloak for authoritarianism but are aimed to achieve a more genuine and effective democracy) but democracy is now universally accepted as the only form of government compatible with international law. It is only the democratic institutional layout that is yet to be locally designed. To put it slightly differently, democracy is universally

⁴⁵⁰ Jean Barale, 'L'Acquiescement dans la Jurisprudence Internationale' (1965) 11 AFDI 389, 400-06.

⁴⁵¹ Brad Roth, *Governmental Illegitimacy in International Law* (OUP 1999) 119.

⁴⁵² Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 Pol Org 887, 915.

⁴⁵³ Richard Youngs, 'Exploring Non-Western Democracy' (2015) 26 Journal of Democracy 140, 140-43.

⁴⁵⁴ *ibid* 140-42.

accepted precisely because it can have a variety of forms none of which is universal. This thesis finds support in the pronouncements of the UNGA which declared that while ‘democracies share common features [such as empowerment and equality]’, there is no ‘single model of democracy’.⁴⁵⁵ Similar viewpoints were expressed by some high-standing international politicians, which claimed that ‘each society will work to realize its own democratic values and build its own democratic institutions in its own way, because we also recognize the uniqueness of culture and history and experience’⁴⁵⁶ and ‘[w]hile democracy is the cornerstone of the European Union, it is clear there is no single model for democratic government’.⁴⁵⁷ Hence, it is fair to suggest that given the absence of protest on the part of the majority of states with regard to democracy as the only legitimate form of government irrespective of the diversity of visions concerning the right democratic institutional design, it is plausible to claim that states consented, or acquiesced, to the democratic rule as a legal norm and are, thus, bound by it.

4.4.2.4. Substance over Form

The last principle exerting impact on democratic entitlement is the principle of the prioritisation of substance over form (also commonly referred to as *ex re sed non ex nomine*). This is not to say that there are no other principles shaping the modalities of this discussion. Rather, their in-depth examination merits a separate book and is not possible in a work of this scale. By essence, the principle of substance over form, which gained a near-universal acceptance in various national systems,⁴⁵⁸ presupposes that one ‘looks to the substance rather than form of a transaction and does not require “unnecessary formalities” to be observed’.⁴⁵⁹ Similarly to estoppel and acquiescence, the doctrine stems from the principles of good faith and *abus de droit*.⁴⁶⁰ The demands of good faith are, thus, inconsonant with formalism which is marked by the prevalence of

⁴⁵⁵ UNGA Res 62/7 (8 November 2007) UN Doc A/RES/62/7.

⁴⁵⁶ Hillary Clinton, ‘Remarks at the Launch of Strategic Dialogue with Civil Society’, *US Department of State* (Washington DC, 16 February 2011) <<http://www.state.gov/secretary/20092013clinton/rm/2011/02/156681.htm>> accessed 31 August 2016.

⁴⁵⁷ EU, ‘Statement by High Representative Catherine Ashton on the Occasion of the International Day of Democracy’, A359/11 (Brussels, 15 September 2011) <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/124598.pdf> accessed 31 August 2016. For a more detailed exposition of the arguments for non-Western democracy, see Richard Youngs, *The Puzzle of Non-Western Democracy* (Carnegie Endowment for International Peace 2015) 15-19.

⁴⁵⁸ Ciaran Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013) 317.

⁴⁵⁹ Hilary Delany, *Equity and the Law of Trusts in Ireland* (3rd edn, Thomson Roundhall 2003) 34.

⁴⁶⁰ Ciaran Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013) 318.

form over substance.⁴⁶¹ The Court had on several occasions to employ the principle.⁴⁶² In *Barcelona Traction*, the ICJ extended the right of diplomatic protection to legal entities through the usage of two equitable doctrines, such as *ubi ius, ubi remedium* and ‘substance over form’. It justified its decision by stating that ‘it is necessary that the law be applied reasonably’.⁴⁶³ In the *Nicaragua* case, the Court despite Nicaragua’s failure to formally complete the process of ratification of its acceptance of the PCIJ jurisdiction, recognised Nicaragua as having met the requirements of compulsory jurisdiction.⁴⁶⁴ The rationale behind such a decision can be found in the equitable principle of *ex re sed non ex nomine*, that is equity will give credence to the substance of a transaction rather than its form. It does not mean, however, that substance will always prevail. Rather, ‘unnecessary formalities’ shall be dispensed with. Moreover, in certain domestic legal systems the invocation of formal deficiency to support one’s claim is viewed as *abus de droit*.⁴⁶⁵

Turning to the right to democracy, it is important to remind the reader that there are two competing conceptions of democracy in political theory that were eventually transplanted to the field of international law: procedural (narrow) and substantive (broad). The former views democracy as a process in which new government comes into power through elections and is well-captured in the writings of Schumpeter: ‘The democratic method is that of institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote’.⁴⁶⁶ Substantive conception, on the contrary, is based on democracy’s underlying principles, such as political equality and popular sovereignty, rather than merely elections. As Beetham has amply contended, ‘[i]ts [democracy] defining principles are that all citizens entitled to a say in public affairs, both through the associations of civil society and through participation in government, and that this entitlement should be available on terms of equality to all’.⁴⁶⁷ The predominance of the procedural understanding of democracy in international legal scholarship leads to a quite unfair result, whereby states that

⁴⁶¹ See generally Olivier Corten, *L’utilisation du ‘raisonnable’ par le juge international* (Bruylant 1997).

⁴⁶² *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Merits) [1970] ICJ Rep 3; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392.

⁴⁶³ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Merits) [1970] ICJ Rep 3, 48. See also Dissenting Opinion of Judge Yusuf in *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Merits) [2014] ICJ Rep 226, para 15.

⁴⁶⁴ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, paras 109-10.

⁴⁶⁵ Ciaran Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013) 222.

⁴⁶⁶ Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (6th edn, Routledge 1994) 269. Other scholars reducing democracy to elections are Samuel P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991) 7-9; Adam Przeworski and others, ‘What Makes Democracies Endure?’ (1996) 7 *Journal of Democracy* 39, 50-51.

⁴⁶⁷ David Beetham, *Democracy and Human Rights* (Polity Press 1999) 90-91.

organise elections to further their political image and legitimacy on the international scene but are unwilling to undertake any substantial effort to ensure meaningful participation of their citizens in political process (facade democracies) are treated on a par with liberal democracies. Moreover, states may use the institution of elections to shield themselves from international scrutiny of their human rights records. Considering the fact that many electoral democracies may be repressive towards their citizens and actively violate their human rights,⁴⁶⁸ as the cases of Russia, Belarus and other post-communist countries illustrate, the purely procedural reading of international legal texts, such as, for instance, article 25 ICCPR, may lead to controversial results unresponsive to the interests of justice. The application of the principle of prioritisation of substance over form may mitigate this inequity by reading into the democratic provisions of international and regional instruments the substantive principles of political equality and popular sovereignty. For example, by interpreting ICCPR article 25 through the prism of substance over form maxim would leave no room for states to argue that the article does not prohibit one-party regimes. Moreover, *ex re sed non ex nomine* renders it possible to look not only at the substance of the ICCPR, but also to consider substance of other international and regional texts as well as customary rules covering the same issue.

The application of all the aforementioned principles in tandem provides for an equitable framework for the democratic entitlement. In other words, the combined weight of the applied principles inevitably suggests that the right to democracy forms an integral part of international human rights law. This is not only because international human rights law is essentially grounded on the considerations of human dignity and justice and whose intellectual base is dependent on the congruence with equitable principles but also because such deep interaction between written rules and principles is envisaged in general international law. As has been previously ascertained, article 31(3)(c) VCLT requires treaties to be interpreted against the backdrop of general international law, of which general principles constitute an essential part. This effectively means that general principles should be taken into consideration in interpretation of human rights treaties, including the ICCPR. In other words, whilst one cannot derive the right to democracy exclusively from equitable principles, one can definitely do such derivation from international human rights standards interpreted against the background of such principles as ‘relevant rules of international law applicable in the relations between the parties’.⁴⁶⁹ At this junction, the primary role of general principles is to ensure that the already existing but conceptually ambiguous norm — a characteristic animating the democratic entitlement norm — is effective and serves its

⁴⁶⁸ See eg Thomas Carothers, ‘The End of the Transition Paradigm’ (2002) 13 *Journal of Democracy* 5, 9-10; Steven Levitsky and Lucian A Way, ‘The Rise of Competitive Authoritarianism’ in Larry Diamond and Marc F Plattner (eds), *Democracy: A Reader* (The Johns Hopkins UP 2009) 246.

⁴⁶⁹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 33 (VCLT) art 31(3)(c).

purpose. The author of this thesis is aware of the possible shaky ground on which the present argument lies given the absence of more concrete legal rules on the subject and the paucity of pronouncements of the World Court to draw on. However, as Burke noted on several occasions, general principles exist autonomously, irrespective of whether the Court had an opportunity to elucidate them in its jurisprudence or not.⁴⁷⁰ In addition, the authoritativeness of the present equitable framework is strengthened by the fact that only principles that have manifested themselves in the judgements and opinions of the PCIJ /ICJ have been employed. This is pinned on a consideration that the practice of the World Court in terms of dealing with general principles in the context of inter-state disputes appears the safest base upon which to ground the equitable theory of the democratic entitlement thesis.

4.5. Taking Stock: Is Democracy a Human Right?

The preceding chapter has shown that democracy has passed the stage when it was regarded as an exclusively domestic matter. With the advent of international human rights law, it evolved from being a purely political goal to a human right. Moreover, the ongoing globalisation and transformation of national political space and the attendant constitutionalisation of international law have affected the normative scope of the democratic entitlement to the extent that it now stretches itself well beyond the electoral method. Thus, legal foundations of the right to democracy lie in international human rights treaties, customary international law, various non-treaty instruments as well as general principles of law recognised by civilised nations. Taken in tandem, they constitute an international law of democracy. They interact and reinforce each other. Global constitutionalism is both an outcome and an engine of this process of convergence.

That said, it has been firstly established that the principle international treaty source of the right to democracy is article 25 ICCPR. By virtue of being a human rights treaty, the Covenant urges teleological interpretation of its provisions, including the aforementioned article. After the critical examination of the Covenant's preambular text, provisions of its article 25 and other relevant material, including external sources, as an expression of its object(s) and purpose(s), it was concluded that the ICCPR's object-and-purpose test restricts the range of choices governments can make with respect to their political system. Such conclusion was reinforced by an assertion that the teleological method inevitably implies evolutive interpretation, pinned on an idea that international law is to be viewed as a system. Against this backdrop, it has been asserted that interpretative techniques developed by regional human rights tribunals are directly applicable to the ICCPR article 25's interpretation

⁴⁷⁰ Ciaran Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013) 297.

— an idea that has also found support in the recent jurisprudence of the HRC. Thus, reading the Covenant, including its article 25, as a ‘living instrument’ and in the light of modern ‘commonly accepted standards’ inevitably implies liberal democratic form of government. In other words, the widely-shared assertion that the ICCPR does not presuppose any particular political system but merely codifies the right to elections can no longer hold. As Cerna pointedly concluded, ‘by becoming a party to a human rights instrument, a state agrees to organize itself along democratic lines’.⁴⁷¹

Secondly, it has been ascertained that democracy has evolved into a customary norm given the ample evidence of *opinio juris* as expressed in both UN fora and other regional arrangements. Such conclusion has been reached by positing that constitutionalisation of international law has affected the way custom is formed. For a customary norm to arise, verbal statements by states, either directly or through the venues of international organisations, as a reflection of *opinio juris* that certain norm is desirable now or in the future as an authoritative legal norm are viewed as sufficient, whereas the traditional requirement of general and consistent state practice is considered less important. Thirdly, the role of soft law in international law in general and its impact on the democratic entitlement in particular has been revisited. It was concluded that even though the plurality of existing non-binding commitments to install and protect democracy is not per se sufficient to claim a full-fledged right to democracy, they undeniably exert a strong impact on the conceptual and legal ramifications of the right concerned and constitute an essential phase in the process of hardening of the ‘emerging’ democratic norm.

Finally, it has been established that the commonly neglected third source — general principles of law recognised by civilised nations — plays an important role in sharpening the normative scope and effectiveness of existing legal norms, including the right to democracy. Thus, a set of equitable principles, including good faith, estoppel, acquiesce and substance over form, constituting a sub-category of general principles of law most commonly invoked in the jurisprudence of the World Court, has been examined in order to strengthen the democratic entitlement thesis and clarify its legal scope. Because the primary purpose of equitable principles is to ensure that the law is applied justly, to deny democratic entitlement by defending the election-centred approach to democracy is to neglect this important source of law. This position taken in conjunction with the aforementioned considerations leads to a conclusion that international law in principle encompasses a right to (liberal) democracy.

Be this as it may, it is commonly asserted that because the global index of the implementation of democratic norm is still quite low and there even appears to be a consistent state practice of *violating* the norm, democracy has not yet crystallised into a legal right/obligation. However, the weakness of national and international enforcement of democracy as a legal norm does not

⁴⁷¹ Christine Cerna, ‘Universal Democracy: An International Legal Right or a Pipe Dream of the West’ (1995) 27 NYUJ Int’l L & Pol 290, 295.

repudiate the validity of the democratic entitlement. Human rights do not cease to be rights simply because they are honoured more in breach than in observance. As Henkin observed

In principle, whether the human rights agreements are being honored, whether the individuals are in fact enjoying the human rights promised, is not immediately relevant legally (or philosophically) [...] failure of one or more states to carry out their international human rights undertakings does not vitiate the character of the undertakings as legal obligations, or the rights and duties they create.⁴⁷²

However, he added one caveat: non-observance of human rights does not affect their character as rights if it is for the short term. Should such non-confirming behaviour endure over an extended period of time ‘one would have to consider whether there are legal obligations and consequent rights and duties’.⁴⁷³ Despite the ostensibly hard logic behind this claim, which is certainly relevant for state obligations vis-à-vis each other, it is doubtful whether it accounts for the special nature of human rights obligations, which are owed not to states *inter partes* but to individuals. States do not create human rights but recognise them through codification and enforcement. That states fail to implement human rights may weaken their enjoyment but do not strip them of their quality as rights. Moreover, there is a permanent tension between states’ self-interests and human rights — that is, it is often the case that guaranteeing human rights to their subjects may be in contradiction to states’ immediate goals and even represent a significant burden on states’ freedom of action as well as economic resources — a tension which is less salient with respect to more ‘practical’ coordination norms. Such tension inevitably leads to the widespread human rights violations, including the right to democracy, without affecting their status as rights.

Finally, one may question the authentic value of the democratic entitlement with respect to the already extant internationally recognised rights to freedom of election, assembly, speech, association, movement and prohibition of discrimination, to name but a few. Would not their combined realisation automatically lead to democracy? As Alston suggested, in order for a claim to qualify as a human right, it must, among others, ‘be consistent with, but not merely repetitive of, the existing body of international human rights law’.⁴⁷⁴ It is often said that democracy is an ‘aggregate right’, as it draws its substance from other internationally recognised civil and political rights. However, it is frequently overlooked that the principal value of democracy as a self-standing

⁴⁷² Louis Henkin, *The Age of Rights* (Columbia UP 1990) 40. See also Ronald Rich, ‘Brining Democracy into International Law’ (2001) 12 *Journal of Democracy* 20, 30 (‘The democratic entitlement flows from individual and collective human rights, and, as in human rights law, the weakness of enforcement nationally or internationally does not vitiate the validity of the right’).

⁴⁷³ Louis Henkin, *The Age of Rights* (Columbia UP 1990) 40.

⁴⁷⁴ Philip Alston, ‘Conjuring up New Human Rights: A Proposal for Quality Control’ (1984) 78 *AJIL* 607, 615.

‘monolithic’ right is the fact that it brings certain normative idea, certain ideological element that is otherwise missing in the traditional ‘right-to-vote/right-to-stand-for-election’ debate. This ‘novel’ right buttresses the effectiveness of other human rights by imputing greater determinacy in their otherwise open-ended texture and lessens the room for their abuse. For instance, the right to democracy as a self-standing right is justified by urgent moral goods, such as equality. As Christiano put it, ‘[t]he human right to democracy [...] asserts that there is a strong moral justification for states to adopt or maintain the institutions of minimally egalitarian democracy and it is morally justified for the international community to respect, protect and promote the right of each person to participate in minimally egalitarian democratic decision-making concerning their society’.⁴⁷⁵ Another essential normative idea born by democracy as a right in and of itself is the notion of citizen empowerment, that is everyone is entitled to actively partake in the decisions that affect one’s fulfilment of basic human rights: ‘Inasmuch as people are social beings [...] engaging in common or joint activities with others can be seen as itself one of the prime conditions for their freedom’, as itself a human right.⁴⁷⁶

Henceforth, having ascertained that democracy is now a human right, the question of military coups and other anti-constitutional changes of government as well as revolutions acquire a completely new magnitude in international legal debate. If democracy is a human right then all sorts of democratic disruptions are to be regarded as violations of this right and, thus, illegal under international law justifying international responses, including by military means. Moreover, if a human right is violated there should be a remedy. Hence, one can argue that the right of revolution is one of such remedies, so to say the ultimate one, when democratic government is toppled or when democratisation is resisted by the leader of the day. The next two chapters will take a closer look at these issues.

⁴⁷⁵ Thomas Christiano, ‘An Egalitarian Argument for a Human Right to Democracy’ in Cindy Holder and David Reidy (eds), *Human Rights: The Hard Questions* (CUP 2013) 302-03.

⁴⁷⁶ Carol G Gould, ‘The Human Right to Democracy and Its Global Import’ in Cindy Holder and David Reidy (eds), *Human Rights: The Hard Questions* (CUP 2013) 292.

5. External Defence of Democracy

The previous chapter has shown that international law envisages the right to democratic governance. Albeit it was concluded that the weak enforcement of the right in question does not deny its character as a right, the existing gap between the language of democracy and the actual practice undoubtedly undermines the progress of democratisation and its legitimacy. Moreover, such deficiency at the level of implementation has been invoked as the most powerful counter-argument against the democratic entitlement thesis.¹ To provide for a stronger case for the right to democracy, one has to show that not only does it exist as an abstract concept impenetrable for orthodox techniques of legal interpretation and analysis but it is also actively defended both by the international community (external defence) and domestic actors (internal defence). That said, defence of democracy denotes measures aimed to prevent democratic backsliding as well as reactions to democratic backsliding and, in the most extreme case, forceful responses to democratic breakdown.² Such measures may include the international condemnation of an illegitimate act, the threat to suspend a government's membership or to cut economic benefits and the employment of increasingly robust measures, such as visa restrictions on copy plotters, arms embargoes, freezing of assets and, in exceptional cases, the use of military force. Together, they evidence the emergence of a new international norm: once put in place, the people's right to live in a democratically constituted state shall not be abridged and attempts to do so justify international counter-actions.

External defence of democracy has developed through state practice and has been formalised through the adoption of international instruments, hard and soft, containing so-called 'democracy clauses' — 'multilateral mechanisms for protecting democracy when it is constitutionally interrupted or threatened by autocratic rulers'.³ Their most prominent feature is the collective response to unconstitutional changes of governments, such as military coups and executive coups, commonly designated as *coups d'état* (French for 'stroke of the state'). *Military coup* is an illegal change of government in which military elite ousted the incumbent regime and installed some form of military dictatorship. It 'consists of the infiltration of a small but critical segment of the state apparatus, which is then used to displace the government from its control of the remainder'.⁴ Military coups are typically

¹ See eg Brad R Roth, 'Evaluating Democratic Progress' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 512.

² See Jorge Heine and Brigitte Weiffen, *21st Century Democracy Promotion in the Americas: Standing Up for the Polity* (Routledge 2015) 14-15.

³ Theodore J Piccone, 'International Mechanisms for Protecting Democracy' in Morton H Halperin and Mirna Galic (eds), *Protecting Democracy: International Responses* (Lexington Books 2005) 101.

⁴ Edward Luttwak, *Coup d'État: A Practical Handbook* (Harvard UP 1968) 21.

executed by means of force. But force is not their defining feature. Other extra-legal tactics are also possible. This has become to be known as *executive coup* (also called self-coup or *autogolpe*) — an extraconstitutional event in which democratically chosen executives effectively ended democracy by concentrating power in their hands by, inter alia, closing congress, purging courts, suspending the constitution, prolonging the term of tenure, declaring a state of emergency or martial law.⁵ Some authors also distinguish so-called ‘*impeachment coups*’ — ‘illegal — and often violent — acts by a disloyal opposition that unseat elected presidents and effect a quasi-legal transfer of power to a constitutionally designated successor’.⁶ To put it bluntly, whereas executive coups involve an attack on a democratically-elected legislature by the executive branch, impeachment coups refer to a quasi-constitutional action by a legislature to remove a democratically-elected president. The seizure of power by military junta or a civilian actor is historically the oldest way of establishing a modern form of authoritarianism dating back to Napoleon 1799’s coup, not to mention the days of the Roman empire when Julius Caesar ascended to power through a coup in 49 BCE. Nowadays, it is allegedly the most important factor leading to the breakdown of a democratic rule. According to the statistical data, three out of every four successful ousters of democratic regime are conducted by means of a *coup d’état*.⁷

There are also a range of events that do not attain the level of a coup but which, nonetheless, lead to the erosion of the democratic order in a more gradual and sustained manner. These include, among others, the use of public office to harass opposition and institutionalise a single party policy, the restriction of human rights, the illegal and arbitrary appointment and dismissal of elected authorities or representatives of the judiciary as well as the failure to hold periodic and genuine elections and accept electoral outcomes.⁸ There is not always a clear fine line between these cases of democratic deterioration and *coups d’état* proper. All too often the same situation may tend to be characterised in the three above-mentioned ways. The analysis of the mechanisms at the hands of the international community to respond to both

⁵ See Samuel P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991) 291. See also Charles Sampford, ‘Coups d’État and Law’ in Elspeth Attwooll (ed), *Shaping Revolution* (Mercat Press 1991) 164; Francis N Ikome, ‘Good Coups and Bad Coups: The Limits of the African Union’s Injunction on Unconstitutional Changes of Power in Africa’ (2007) Institute for Global Dialogue Occasional Paper No 55, 8 <http://igd.org.za/jdownloads/Occasional%20Papers/igd_occasional_paper_55.pdf> accessed 31 August 2016; Paul Brooker, ‘Authoritarian Regimes’ in Daniele Caramani (ed), *Comparative Politics* (OUP 2013) 97; Nikolay Marinov and Hein Goemans, ‘Coups and Democracy’ (2014) 44 *Brit J Pol Sci* 799, 801-02.

⁶ Dexter S Boniface, ‘The OAS’s Mixed Record’ in Thomas Legler, Sharon F Lean and Dexter S Boniface (eds), *Promoting Democracy in the Americas* (Johns Hopkins UP 2007) 43.

⁷ Nikolay Marinov and Hein Goemans, ‘Coups and Democracy’ (2014) 44 *Brit J Pol Sci* 799, 801.

⁸ See Denisse R Olivari, ‘The Role of the Organization of American States in Promoting Democracy’ (International Institute for Democracy and Electoral Assistance 2014) 9 <<http://www.idea.int/resources/analysis/the-role-of-the-organization-of-american-states-in-promoting-democracy.cfm>> accessed 9 August 2016.

coups d'état and other threats against democracy is crucial for ascertaining the (external) enforcement dimension of the right to democracy and strengthening thereby legitimacy of the democratic entitlement doctrine. In what follows, it will be elucidated how the international community acts in defence of democracy.

5.1. Global System of the External Defence of Democracy

Since Thomas Franck's seminal article of 1992 on democratic entitlement, in which the author asserted that undemocratic regimes should be denied the benefits of collective security arrangements, such as those under Chapter VII of the UN Charter,⁹ international legal scholars, especially the ones falling under the label of 'democratic entitlement school', have advanced an idea that post-Cold War international law assumed a defensive stance vis-à-vis democratic disruptions. Military coups, it has been said, 'constitute terrible violations of the political rights of the collectivity, and they invariably bring in their wake serious violations of all other human rights'.¹⁰ Consequently, governments that came to power through undemocratic means should be denied recognition in the international fora.¹¹ In more robust terms, it has been suggested that 'coups against elected governments are now, *per se*, violations of international law', and that 'regional organizations are now licensed to use force to reverse such coups'.¹² Whilst such progressive claims are largely limited to the North American continent and are treated with suspicion by other corners of scholarly community,¹³ they echo modern developments at the core of international legal regimes governing state recognition and the use of force.

That being said, the first place to look for international legal norms prohibiting usurpation of constitutional processes is article 30 UDHR, which reads: 'Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act

⁹ Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 AJIL 46.

¹⁰ Michael W Reisman, 'Sovereignty and Human Rights in Contemporary International Law' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 257-58.

¹¹ Gregory Fox, 'The Right to Political Participation in International Law' (1992) 17 Yale J Int'l L 539, 597.

¹² Brad Roth, *Governmental Illegitimacy of International Law* (OUP 2000) 407. See also Tayyab Mahmud, 'Jurisprudence of Successful Treason: Coup d'état & Common Law' (1994) 27 Cornell Int'l L J 49, 51.

¹³ See eg Jean d'Aspremont, 'La Licéité des Coups d'État en Droit International' in Société Française pour le Droit International (ed), *L'État de Droit en Droit Internationale* (Pedone 2009) 135 ('Le discours politique et les normes relatives à la protection des droits de la personne humaine [...] [sont] insuffisant à tenir un coup d'État comme illicite'); Jean d'Aspremont, 'Responsibility for Coups d'État in International Law' (2010) 18 Tul J Int'l & Comp L 451, 475 ('Primary rules of international law simply cannot regulate everything, and certainly not unconstitutional changes in governments').

aimed at the destruction of any of the rights and freedoms set forth herein'.¹⁴ Absent direct references to anticonstitutional usurpations of power, one can, nonetheless, claim that the article prohibits ideologies standing in contrast with the rights enshrined in the Declaration. Indeed, how can any political ideology or form of government, except for democracy, be in compliance with, say, article 21 of the Declaration providing for a right to participation in elections? Importantly, contemporary hybrid regimes managing to ensure a certain modicum of political participation, normally limited to elections, and yet failing on other democratic indicators (real political freedom, accountability, transparency, independent judiciary, free opposition etc.) can ostensibly meet the requirements of article 21 and yet remain undemocratic. However, such an election-centred reading of the article is anachronistic and does not account for modern transformations within the doctrine of treaty interpretation.¹⁵ Albeit not an international treaty, the UDHR is widely perceived as an authoritative interpretation of the provisions of the UN Charter and should, henceforth, be interpreted in line with the modern developments animating the field of treaty interpretation. This assertion can be supported by the fact that most provisions of the Declaration found their way into the two Covenants and must be interpreted in accordance thereto. To claim otherwise, is to undermine uniformity in international human rights law. Against this backdrop, it is fair to posit that article 30 UDHR taken in conjunction with article 21 and other articles of the Declaration protecting democratic rights effectively disclaims the legitimacy of non-democratic regimes.

Article 30 UDHR is almost *verbatim* reiterated in article 5 ICCPR.¹⁶ In *MA v Italy*, the Committee held that individuals must not abuse their rights to promote fascist policies which call for the destruction of the rights of others. Such acts are removed from the protection of the Covenant by article 5.¹⁷ However, the Committee seemingly displayed more sympathy to left-wing antidemocratic views. In *Sohn v Republic of Korea*, the Committee found in favour of the applicant who was arrested for his support of the labour movement spreading the ideas of proletarian revolution by stating that 'the State party has failed to specify the precise nature of the threat which it contends that the author's exercise of freedom of expression posed and finds that none of the arguments advanced by the State party suffice to render the restriction of the author's right to freedom of expression compatible with paragraph 3 of article 19'.¹⁸ Further, the Committee held that undemocratic

¹⁴ Universal Declaration of Human Rights, UNGA Res 217(III)A (10 December 1948) art 30.

¹⁵ For a more detailed overview, see section 4.1.

¹⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 5 ('Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant').

¹⁷ *MA v Italy* (1981) 2 Selected Decisions of the Human Rights Committee 31, para 13(3).

¹⁸ *Jong-Kyo Sohn v Republic of Korea* (1992) 5 Selected Decisions of the Human Rights Committee 163, para 10(4). See also *Keun-Tae Kim v Republic of Korea* (1994) 6 Selected Decisions of the Human Rights Committee 110, para 12(5) ('The Committee considers therefore

institutions should not have significant political power. For instance, in its Concluding Observations on Chile it observed: 'The Committee is deeply concerned by the enclaves of power retained by members of the former military regime. The powers accorded to the Senate to block initiatives adopted by the Congress and powers exercised by the National Security Council, which exists alongside the Government, are incompatible with article 25 of the Covenant'.¹⁹

One should also be reminded of a more recent instrument elaborating the right of peoples to defend their fundamental rights and, if necessary, by using force. Article 28 of the Universal Declaration of the Rights of Peoples (also known as the Algiers Declaration) provides that '[a]ny people whose fundamental rights are seriously disregarded has the right to enforce them, specially by political or trade union struggle and even, in the last resort by the use the force'.²⁰ While it is a soft instrument and lacks enforcement capacity, it remains to be a living document applicable to people in their struggle against oppression.

Yet, the most important instrument regulating relations between states and their collective response to recalcitrant behaviour is the Charter of the United Nations.²¹ To say that the UN Charter contains a 'democracy clause' is to immediately effect an earthquake within the international legal circles. The paradigmatic principles of non-use of force (article 2.4) and non-intervention (article 2.7) are the central pillars of the Charter's regime. Moreover, the membership of the Organisation is open to all *peace-loving states* that are capable to assume international obligations irrespective of their internal organisation.²² It means that peace was to be achieved through universality rather than democracy. This was affirmed in the advisory opinion on *Western Sahara*, where the ICJ has noted that '[n]o rule of international law, in the view of the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today'.²³ The same observation featured in the *Nicaragua* case, in which the Court stressed that:

A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy.²⁴ [...] A State's domestic

that the restriction of the author's right to freedom of expression [distribution of material soliciting the policy of the North Korea] was not compatible with the requirements of article 19, paragraph 3, of the Covenant').

¹⁹ UNHRC 'Concluding Observations on Chile' (1999) UN Doc CCPR/C/79/Add.104, para 8.

²⁰ Universal Declaration of the Rights of Peoples (4 July 1976) art 28 <http://www.algerie-tpp.org/tpp/en/declaration_algiers.htm> accessed 17 August 2016.

²¹ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

²² *ibid* art 4(1).

²³ *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, para 94.

²⁴ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, para 205.

policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law.²⁵ [...] [A]dherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State.²⁶

Yet, the post-Cold War practice of the international community has manifested a change of paradigm with respect to national regimes. The UN Security Council (SC) has been increasingly willing to intervene in 'rogue' and 'failed' states in the name of democratisation. Its authorisation to use force to reinstall democratic government of Jean-Bertrand Aristide in Haiti²⁷ and *ex post facto* approval of the ECOWAS military campaign in Sierra Leone in response to anti-democratic reversal²⁸ as well as its post-war policy of democracy-building in Somalia,²⁹ Liberia,³⁰ Bosnia-Herzegovina,³¹ Kosovo³² and East Timor³³ have been interpreted by various commentators as an evidence of the institutionalisation of the democratic entitlement norm in international law. However, the SC has never referred to democratic disruptions as a principle ground for action. Instead, it availed itself of the traditional formula of a 'threat to international peace and security' to justify its action under the Charter's collective security regime. Determination by the SC of an event as a threat to the peace under Chapter VII constitutes an exception to the principle of non-interference of the Charter³⁴ and the issue in question is immediately removed from the exclusive domestic jurisdiction of the sovereign state. Because no action of the SC has ever been triggered solely by the need to protect domestic democracy from authoritarian attacks but has rather been grounded on its

²⁵ *ibid* para 258.

²⁶ *ibid* para 263.

²⁷ UNSC Res 940 (31 July 1994) UN Doc S/RES/940, para 4 (The SC, '[a]cting under Chapter VII of the Charter of the United Nations, authorize[d] Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti').

²⁸ UNSC Res 1132 (8 October 1997) UN Doc S/RES/1132, para 1 (The SC, acting under Chapter VII of the UN Charter, demanded that 'the military junta take immediate steps to relinquish power in Sierra Leone and make way for the restoration of the democratically-elected government and a return to constitutional order').

²⁹ UNSC Res 814 (26 March 1993) UN Doc S/RES/814.

³⁰ UNSC Res 1116 (27 June 1997) UN Doc S/RES/1116; UNSC Res 1497 (1 August 2003) UN Doc S/RES/1497; UNSC Res 1509 (19 September 2003) UN Doc S/RES/1509; UNSC Res 1521 (22 December 2003) UN Doc S/RES/1521.

³¹ UNSC Res 1031 (15 December 1995) UN Doc S/RES/1031.

³² UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244.

³³ UNSC Res 1272 (25 October 1999) UN Doc S/RES/1272.

³⁴ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 2(7) ('[T]his principle [of non-intervention] shall not prejudice the application of enforcement measures under Chapter VII').

mandate to maintain international peace and security, one cannot claim in principle that the UN Charter's system of collective security now includes a mechanism for defence of democracy. Neither can one deny the fact that because in certain cases *coups d'état*, by virtue of affecting the stability of the region, may *per se* constitute a threat to international peace and security, the Charter indirectly incorporates a mechanism of response to extra-legal changes of government in member states. However, such defensive mechanism is limited to the most extreme cases of democratic interruptions, namely those having bearing on international peace and security.

Be that as it may, it is still far from clear how a non-democratic regime, even the one installed by means of a violent coup, could in itself amount to a threat to international peace and security within the meaning of Chapter VII of the Charter. Byers and Chesterman proposed three possible scenarios. First, *coup d'état* itself may threaten international peace and security. The SC's anti-apartheid and anti-fascist policy of the 1960s and the 1970s are viewed by some as early precedents for the SC action in support of democracy.³⁵ Second, given the central claim of the democratic peace thesis that democracies do not wage wars on each other, the absence of democracy as such may be viewed as endangering international peace and security.³⁶ Albeit this theory may fall squarely within the US unilateral policy of military interventions in Grenada, Panama and Iraq to defend democracy, it has no basis in international law neither is it supported by wider state practice. In fact, apart from Haiti and Sierra Leone, the SC has largely remained inert to antidemocratic politics within states. The third scenario concerns the SC's allegedly unfettered discretion in what may amount to a threat to international peace and security.³⁷ Although in practice the actions of the SC are not subject to any judicial review, this position is not sustainable in principle. According to article 24 of the UN Charter, in discharging its 'primary responsibility for the maintenance of international peace and security [...] the Security Council shall act in accordance with the Purposes and Principles of the United Nations'. This was affirmed in the *Admissions* case, in which the Court pronounced that 'the political character of an organ cannot release it from observance of the treaty provisions established by the Charter when they constitute limits on its

³⁵ Michael Byers and Simon Chesterman, "You, the People": Pro-Democratic Intervention in International Law' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 281-82.

³⁶ *ibid* 282-83. See also Russell Buchan, *International Law and the Construction of the Liberal Peace* (Hart Publishing 2013) 106-07 ('In essence, the SC has adopted a theory that international peace and security can only be maintained in a world of liberal states').

³⁷ Michael Byers and Simon Chesterman, "You, the People": Pro-Democratic Intervention in International Law' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 283. The main proponent of this view was Kelsen who observed: 'It is completely within the discretion of the Security Council as to what constitutes a threat to the peace'. Hans Kelsen, *Law of the United Nations* (Steven 1951) 727. See also Gabriel Oosthuizen, 'Playing the Devil's Advocate: The United Nations Security Council is Unbound by Law' (1999) 12 LJIL 549, 562.

powers³⁸ and the *Namibia* advisory opinion, where the Court stated that '[m]embers of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter'.³⁹

The most credible explanation for the SC's treatment of certain cases of democratic disruption as threats to international peace and security is the SC's evolutionary interpretation of a 'threat'. When the Charter was concluded, 'a threat to international peace and security' was intended to mean almost exclusively the violation of state sovereignty, that is when one state abridged the principle of territorial integrity of another state. Constitutionalisation of international law, occasioned by the growing rate of global interdependence and vulnerability of states vis-à-vis international and domestic policies of one another, has necessitated the revision of the basic principles of international law, including those of the UN Charter. In this framework, 'a threat to international peace and security' has evolved to encompass, apart from conventional attacks against territorial integrity of a state, new types of threats, such as civil wars, terrorism, weapons of mass destruction, humanitarian crises generating large exoduses of refugee flows and lack of democracy. Such practice of the SC is perfectly in line with a teleological interpretation of the Charter, whose purpose is, among others, to promote and encourage 'respect for human rights and fundamental freedoms for all'.⁴⁰ What is more, because evolutive interpretation of treaties assumes that treaty shall be interpreted not only in line with its object and purpose but also 'within the framework of the entire legal system prevailing at the time of the interpretation',⁴¹ it is fair to suggest that global transformations within the international legal order effected by the pioneering march of international human rights law as well as an attenuated understanding of international security occasioned by the emergence of new, non-state-versus-state threats, demands the rapid

³⁸ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)* (Advisory Opinion) [1948] ICJ Rep 57, 64. See also *The Prosecutor v Dusko Tadic* (Jurisdiction) ICTY-94-1-AR72 (2 October 1995) para 28 ('[N]either the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus*'); August Reinisch, 'The Obligation of the Security Council to Respect Human Rights and Humanitarian Law in Adopting Economic Sanctions' (2001) 95 AJIL 853, 856.

³⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 110.

⁴⁰ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 1(3).

⁴¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 53. The Court also adopted the evolutive approach to treaty interpretation in *Aegean Sea Continental Shelf Case (Greece v Turkey)* (Merits) [1978] ICJ Rep 3, para 77; *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Merits) [1997] ICJ Rep 7, para 112; *Iron Rhine Case (Belgium v Netherlands)* (2005) 27 RIAA 35, 37; *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Merits) [2009] ICJ Rep 213, para 63.

adaptability and flexibility of the Charter concluded more than half a century ago. Such developments lend immediate repercussions for the right to democracy since certain cases of democratic reversals that attain the level of a threat to the peace can now trigger the collective security mechanism of Chapter VII of the Charter.

The most recent case of the SC's authorisation to use 'all necessary means' — an euphemism for the use of force — in response to an unconventional threat is Libya 2011, when the Gaddafi government violently suppressed the pro-democratic protests. In resolution 1973, the SC recognised 'the legitimate demands of the Libyan people' and determined that gross and systematic violations of human rights as well as widespread attacks on civilian population constituted a threat to international peace and security.⁴² Whilst the response of the international community characterised by a range of non-forcible and forcible measures, including the military intervention, has been heavily criticised by many as a regime change, the 2011 Libyan case is widely cited as a possible precedent in favour of the pro-democratic intervention thesis.⁴³

What can then be said about disruptions of democracy that do not reach the threshold of a 'threat to international peace and security'? If grounds triggering the application of the Chapter VII measures are absent, then the UNSC is constrained by the domestic jurisdiction provision of article 2(7). This seemingly axiomatic reading of the Charter has been questioned by some pro-democracy scholars. For instance, Reisman and Farer insisted that under modern international law state sovereignty as a supreme, absolute and boundless jurisdictional authority has been replaced by a sovereignty bounded by international law and subject to the will of people, or popular sovereignty.⁴⁴ Likewise, D'Amato and Peters underscored that international law is about people and not about states.⁴⁵ This implies that the test for sovereignty is the democratic organisation of a state and only states representing their people can be deemed sovereign. If so, the collective action to defend democracy cannot be regarded as directed against the 'territorial integrity' of another state within the meaning of article 2(4) of the Charter because its goal is not territorial aggrandisement. On the contrary, by supporting a government accountable to people, such action could be viewed as contributing to the realisation of

⁴² UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

⁴³ Simon Chesterman, "'Leading from Behind': The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention after Libya' (2011) 24 *Ethics & Int'l Aff* 279; Christian Pippan, 'The 2011 Libyan Uprising, Foreign Military Intervention, and International Law' (2011) 2 *Zeitschrift für Recht und Gesellschaft* 159; Mehrdad Payandeh, 'The United Nations, Military Intervention, and Regime Change in Libya' (2012) 52 *Va J Int'l L* 355.

⁴⁴ See Michael W Reisman, 'Coercion and Self-Determination: Construing Charter Article 2 (4)' (1984) *AJIL* 642, 643-44; Michael W Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 *AJIL* 866, 868; Tom J Farer, 'Collectively Defending Democracy in a World of Sovereign States: The Western Hemisphere's Prospect' (1993) 15 *Hum Rts Q* 716, 721.

⁴⁵ Anthony D'Amato, 'The Invasion of Panama Was a Lawful Response to Tyranny' (1990) 84 *AJIL* 516, 523; Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 *EJIL* 513.

‘political independence’ of that state.⁴⁶ Other attempts to bypass the article 2(7) unequivocal prohibition of intervention in the domestic affairs of states in cases falling short of ‘threats to the peace’, ‘breaches of the peace’ and ‘acts of aggression’ include assertions by some scholars that democracy is a *jus cogens* norm by virtue of constituting an internal aspect of the principle of self-determination. The latter is, according to many scholars, a peremptory norm of international law, whose abrogation is not allowed.⁴⁷ On this view, the principles of state sovereignty, territorial integrity and non-intervention, themselves being peremptory norms, cannot trump the democratic norm. Such view is also based on a negative reading of the Declaration on Principles of International Law concerning Friendly Relations — which is widely accepted as customary international law — which provides that states failing to conduct themselves in compliance with the principle of self-determination do not enjoy protection of their territorial integrity and political unity.⁴⁸

Whilst the aforementioned interpretations of the UN Charter and other relevant documents are laudable at the level of legal argumentation and even morally justifiable, they fail to gather broader scholarly support since they arguably ‘turn [...] wishes into reality and conflate legal and moral considerations’.⁴⁹ It is true that states, by entering into international obligations, including human rights obligations, by means of treaty or custom gave up a portion of their sovereignty to international scrutiny. However, it is too strong a claim to assert that the international community can now resort to military action to enforce these duties. It follows that at the global level, the collective action to defend democracy is limited to cases when attacks against democracy are defined by the SC as threats to international peace and security. Because there are no clear legal criteria for identifying ‘a threat’, particularly given the fact that the decision-making processes within the SC take place all too often in the realm of politics rather than law, the effectiveness of the global mechanism of the collective defence of democracy is at this stage rather meagre. Apart from the watershed cases of Haiti, Sierra Leone and Libya, the SC either stopped short of applying non-coercive measures or failed to act at all. However, the effectiveness of the collective security mechanism shall not be evaluated by a sheer number of applied sanctions or authorised military interventions. Sometimes responses in the form of condemnations (by means of, say, presidential statements or press releases) are equally efficient and/or equally important for breeding the culture of intolerance to undemocratic

⁴⁶ Anthony D’Amato, ‘The Invasion of Panama Was a Lawful Response to Tyranny’ (1990) 84 AJIL 516, 520; See also Fernando Teson, *Humanitarian Intervention: Inquiry into Law and Morality* (Transnational Publishers 1997) 151.

⁴⁷ See eg Reginald Ezetah, ‘The Right to Democracy: A Qualitative Inquiry’ (1997) 22 Brook J Int’l L 495, 509.

⁴⁸ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970).

⁴⁹ Michael Byers and Simon Chesterman, “‘You, the People’: Pro-Democratic Intervention in International Law’ in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 292.

politics and aid in the creation of *opinio juris* within the broader process of customary law formation. As has been rightly asserted, ‘advancement of democracy [came to be] one of the most powerful international policy dynamics in the post-Cold War Era, it is [...] now a broad-ranging, relatively well-funded and firmly institutionalised policy field’.⁵⁰

Yet, the most sophisticated mechanisms of external defence of democracy have been developed at the regional levels.

5.2. Defending Democracy in Europe: A Tripartite System

At the European level, the system of external defence of democracy has been developed within the framework of three regional organisations: the Council of Europe (CoE), the Organisation for Security and Co-operation in Europe (OSCE) and the European Union (EU). The world’s oldest democracy clause can be found in the CoE — an international organisation established in 1949 with the goal to promote democracy, the rule of law and respect for human rights on the European continent. Article 3 of the Statute of the CoE enlists in a generic manner criteria for membership in the Organisation, which include acceptance of the principles of the rule of law and respect for human rights and fundamental freedoms.⁵¹ Whilst democracy does not explicitly feature in this article, it is mentioned in the preamble as the basis for these principles and should, hence, be read into article 3. In 1993, the Heads of State or Government at Vienna expanded article 3 by explicitly including democracy into the membership criteria.⁵² Article 8 of the Statute envisages a sanction mechanism for violating the article 3 requirements: ‘Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw [...]’. In case of non-compliance it may cease to be a member of the Council.⁵³ It is clear from the above provisions that the definition of threats to democracy is quite broad and may encompass both clear-cut cases of *coups d’état* as well as smaller blows against democratic principles and institutions.

This mechanism was put in action in 1969 against Greece in response to a *coup d’état*. When it was determined that the Greek military clique had violated numerous provisions of the ECHR, the Council was considering suspension of Greece from membership. Without awaiting for the Committee

⁵⁰ Milja Kurki, *Democratic Futures: Revisioning Democracy Promotion* (Routledge 2013) 1.

⁵¹ Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949) ETS No 001, art 3.

⁵² Council of Europe, ‘Vienna Declaration of the Council of Europe’ (Vienna, 9 October 1993) <https://www.coe.int/t/dghl/monitoring/ecri/archives/other_texts/2-vienna/declaration/declaration_vienna_summit_EN.asp> accessed 16 September 2016.

⁵³ Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949) ETS No 001, art 8.

of Minister's decision, Greece withdrew from the organisation. It was readmitted to the Council upon the restoration of democracy.⁵⁴ The democratic clause was also applied to Portugal and Spain, which were only allowed to join the organisation when democracy was re-established in 1976 and 1977 respectively. It was again invoked in 1980 in response to the coup in Turkey, which was barred from the Parliamentary Assembly of the Council and threatened with expulsion until it eventually reinstated elected government in 1983.⁵⁵

The major step taken by the CoE in the sphere of human rights protection and democracy promotion was the adoption of the European Convention on Human Rights (ECHR) in 1950⁵⁶ with the European Court of Human Rights (ECtHR) as its supervisory and enforcement mechanism.⁵⁷ It became the first human rights treaty to give individual standing to lodge cases directly with the appropriate tribunal. Article 17 of the Convention, akin to article 30 UDHR, provides for the mechanism of preventive defence of democracy: 'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention'.⁵⁸ Additionally, second paragraphs of articles 8 (right to private life), 9 (freedom of thought, conscience and religion), 10 (freedom of expression) and 11 (freedom of assembly and association) include restrictions on the exercise of these rights as are, inter alia, necessary in 'a democratic society'. The latter entails considering the proportionality of the measures taken to the aim pursued and whether there was 'pressing social need' for the restriction. These articles became the foundation for the Court's espousal of the doctrine of 'militant democracy'.⁵⁹ The doctrine assumes a belligerent attitude towards actors seeking to undermine democracy's existence by abusing its structures and institutions, which may take form of hate-speech legislation; banning political

⁵⁴ See Alison Duxbury, *The Participation of States in International Organizations: The Role of Human Rights and Democracy* (CUP 2011) 141.

⁵⁵ *ibid.*

⁵⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 005 (ECHR).

⁵⁷ The ECtHR was established in 1959 and constituted together with the European Commission of Human Rights the convention's enforcement machinery. Since 1998, when Protocol 11 came into force, the ECtHR has sat as a full-time court assuming the responsibilities of the former European Commission.

⁵⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 005 (ECHR) art 17.

⁵⁹ The doctrine was developed by Loewenstein in response to the rise of fascism in Europe of the 1930s. See Karl Loewenstein, 'Militant Democracy and Fundamental Rights I' (1937) 31 *Am Pol Sc Rev* 417; Karl Loewenstein, 'Militant Democracy and Fundamental Rights II' (1937) 31 *Am Pol Sc Rev* 638. For a succinct outline of the doctrine, see Dieter Oberndörfer, 'Germany's "Militant Democracy": An Attempt to Fight Incitement against Democracy and Freedom of Speech Through Constitutional Provisions: History and Overall Record' in David Kretzner and Francine K Hazan (eds), *Freedom of Speech and Incitement Against Democracy* (Kluwer Law International 2000).

parties, denying them registration or public funding; criminalisation of certain political organisations; preventing individuals from standing in elections, spreading pamphlets, convene rallies and so on — initiatives that typically interfere with democratic rights. It is a response to what Popper designated the ‘paradox of tolerance’: sometimes too much tolerance can lead to the disappearance of tolerance.⁶⁰

In its early jurisprudence, the Court (as well as the European Commission) applied the doctrine of militant democracy to traditional opponents, such as Fascist and Communist actors. In *German Communist Party (KPD) v Germany*, concerning the challenge to the ban on the German Communist Party, the ECmHR declared that the political aims contemplated by communist ideology, namely establishment of a social-communist system by means of a proletarian revolution and the dictatorship of the proletariat, whether by peaceful means or by violent overthrow of the government, were incompatible with the Convention.⁶¹ Similar conclusion was reached in *Glasesapp v Germany* concerning the denial to the applicant a permanent post of civil servant because of his extremist political beliefs. The Court found no interference with article 10 ECHR, since such denial was based on the failure to meet the personal qualifications for appointment to the civil service, including, among others, commitment to ‘the principles of free democratic constitutional system’ of Germany.⁶² Other important cases where the Court/Commission assumed a militant stance against applicants inspired by the totalitarian doctrine or expressing ideas that represent a threat to the democratic order include *X v Italy*,⁶³ *BH, MW, HP and GK v Austria*,⁶⁴ *Nachtmann v Austria*⁶⁵ and *Schimanek v Austria*.⁶⁶

Yet, the most paradigmatic case of the application of the doctrine of militant democracy by the ECtHR is *Refah Partisi v Turkey*.⁶⁷ The case concerns the dissolution of the leading political party, the Refah Party, by the

⁶⁰ Karl Popper, *The Open Society and Its Enemies* (Routledge 1966) 265.

⁶¹ *German Communist Party (KPD) v Germany* App no 250/57 (1957) 1 YB 222.

⁶² *Case of Glasesapp v Germany* App no 9228/80 (ECtHR, 28 August 1986).

⁶³ *X v Italy* App no 6741/74 (ECmHR, 21 May 1976) (‘[T]he difference in treatment accorded under the Italian legislation to persons inspired by the fascist ideology is justified by the fact that it pursues a legitimate aim, that of protecting democratic institutions’).

⁶⁴ *H, W, P and K v Austria* App no 12774/87 (ECmHR, 12 October 1989) para 2 (‘National Socialism is a totalitarian doctrine incompatible with democracy and human rights and [...] its adherents undoubtedly pursue aims of the kind referred to in Article 17’).

⁶⁵ *Nachtmann v Austria* App no 36773/97 (ECmHR, 9 September 1998) (The Commission referred to Article 17 and reiterated the incompatibility of the doctrine of National Socialism with democracy and human rights).

⁶⁶ *Schimanek v Austria* App no 32307/96 (ECtHR, 1 February 2000) (‘[P]rohibition against activities involving the expression of national socialist ideas is lawful in Austria and, in view of the historical past forming the immediate background of the Convention itself, can be justified as being necessary in a democratic society in the interests of national security and territorial integrity as well as for the prevention of crime. It is therefore covered by Article 10 para. 2 of the Convention’).

⁶⁷ *Case of Refah Partisi (The Welfare Party) and Others v Turkey* Apps no 41340/98, 41342/98, 41343/98 and 41344/98 (ECtHR (GC) 13 February 2003).

Turkish Constitutional Court on charges of undermining the principle of secularism and advocating violence. The Court recognised that ‘totalitarian movements, organized in the form of democratic parties, might do away with democracy, after prospering under a democratic regime’ and accepted the action of the Turkish Constitutional Court as a legitimate exercise of power to preventively defend democracy: ‘[A] State cannot be required to wait, before intervening, until a political party has seized power and began to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy’.⁶⁸ This decision marked a new phase in the ECtHR’s jurisprudence, whereby the doctrine of militant democracy became an explicit feature of the European legal order. Subsequent cases where the Court upheld dissolution of political parties and movements for their extremist and violence-inciting views include *Batasuna v Spain*,⁶⁹ *HU-T and others v Germany*⁷⁰ and *Vona v Hungary*.⁷¹ Another leading case where the Court displayed its intolerant attitude towards anti-democratic actors is *Zdanoka v Latvia* that concerns ineligibility of the applicant to stand for election by reason of former membership of the Communist Party. The Court held that ‘the Latvian authorities were entitled, within their margin of appreciation, to presume that a person in the applicant’s position had held opinions incompatible with the need to ensure the integrity of the democratic process, and to declare that person ineligible to stand for election’.⁷²

Such vigilant stance of the Court with respect to political extremism has been roundly criticised for its nondemocratic outcomes. As Alberto Asor Rosa astutely noted: ‘[D]emocracy, precisely because it is a system of mediocrity that cannot make itself out to be an absolute or an end in itself [...] is a game whose defining feature is that it allows its own rules to be called into question. If it does not, it is already something else’.⁷³ In other words, exclusion of certain voices from the political debate in the name of democracy endangers political pluralism and leads to the creation of a kind of ‘petrified oligarchy’.⁷⁴

⁶⁸ *ibid* paras 99 and 102 respectively.

⁶⁹ *Herri Batasuna and Batasuna v Spain* Apps no 25803/04 and 25817/04 (ECtHR, 30 June 2009) para 91 (‘Actions and speeches imputable to the applicant political parties [supporting terrorist activities of ETA], taken together, give a clear picture of a model of society conceived and advocated by them, which is incompatible with the concept of a “democratic society”’).

⁷⁰ *Hizb Ut-Tahir (HU-T) and others v Germany* App no 31098/08 (ECtHR, 12 June 2012) para 74 (‘[T]he [...] applicant attempts to deflect Article 11 of the Convention from its real purpose by employing this right for ends which are clearly contrary to the values of the Convention’).

⁷¹ *Case of Vona v Hungary* App no 35943/10 (ECtHR, 9 December 2013) para 102 (The Court stated that a state was entitled to take preventive measures to protect democracy even if the political movement had not made an attempt to siege power and the danger of its policy was not sufficiently imminent).

⁷² *Case of Zdanoka v Latvia* App no 58278/00 (ECtHR (GC) 16 March 2006) para 124.

⁷³ Alberto Asor Rosa, *La felicità e la politica [Happiness and Politics]* (Laboratorio Politico 1981) 10, 30-31 translated by Niels Petersen, ‘The Principle of Democratic Teleology in International Law’ (2009) 34 *Brook J Int’l L* 33, 52.

⁷⁴ The modern understanding of the term originates from the work of Robert Michels, *Political Parties: A Sociological Study of the Oligarchic Tendencies of Modern Europe* (The Free Press 1962).

instead of democracy. Moreover, the role of the ECtHR in deciding issues of essentially domestic constitutional nature is rather dubious given its limited mandate to interpret and apply the ECHR. This notwithstanding, the trend laid down by the Court to defend democracies against breakdown is irreversible and speaks eloquently about (substantive) democracy as the only form of government compatible with the ECHR. To halt misuse, the CoE's advisory body, the European Commission for Democracy through Law (better known as the Venice Commission), issued the *Guidelines on the Prohibition and Dissolution of Political Parties and Analogous Measures*, in which it asserted the subordinate status of such measures to freedom of political expression and association as well as their exceptional nature.⁷⁵

In terms of geographical breadth, the most comprehensive system of collective defence of democracy in Europe has been developed within the framework of the OSCE, created in 1973 as a predominantly security-oriented organisation.⁷⁶ Its mandate also includes issues of human rights, the rule of law and democratic governance, which constitute one of the organisation's security pillars. The political, as opposed to legal, nature of the organisation — what has been dubbed as 'soft' organisation⁷⁷ — has facilitated far-reaching pronouncements on democracy and its defence. Following the end of the Cold War, the OSCE adopted several important documents which laid down foundations for its system of democracy protection. The first document, the 1990 Copenhagen Document, underscored the importance of representative democracy for ensuring respect for human rights and committed the participating states 'to defend and protect [...] the democratic order freely established through the will of the people against the activities of persons, groups or organisations that engage in or refuse to renounce terrorism or violence aimed at the overthrow of that order or that of another participating state'.⁷⁸ This nebulous formulation has been interpreted by some as a right and responsibility of participating states to restore democracy and, if necessary, by military means.⁷⁹ In fact, the provision in question does not give an authorisation to use force but neither does it exclude it. This was the first

⁷⁵ European Commission for Democracy through Law (Venice Commission), *Guidelines on the Prohibition and Dissolution of Political Parties and Analogous Measures* (10 January 2000) art 3 <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF\(2000\)001-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2000)001-e)> accessed 4 August 2016.

⁷⁶ The Organization has its roots in the 1973 Conference on Security and Co-operation in Europe (CSCE) culminating in the Helsinki Final Act of 1 August 1975 which became its constitutive document.

⁷⁷ The informal nature of the organization is emphasized by the designation of its members as 'Participating States' and the fact that its founding document, the 1975 Helsinki Final Act, is not a legally binding treaty. See Jan Klabbers, 'Institutional Ambivalence by Design: Soft Organizations in International Law' (2001) 70 NJIL 403.

⁷⁸ OSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990) paras 1, 6 <<http://www.osce.org/odihr/elections/14304>> accessed 29 August 2016.

⁷⁹ Malvina Halberstam, 'The Copenhagen Document: Intervention in Support of Democracy' (1993) 34 Harv J Int'l L 163, 167.

recognition in an international instrument of the importance of democratic form of governance for human rights and security. The commitments of the Copenhagen Document were strengthened with the adoption of the 1990 Charter of Paris for a New Europe,⁸⁰ which refers to democracy as 'the only system of government of our nations' and sets up adherence to democracy and human rights as a condition of membership.⁸¹

Yet, the first document that introduced democracy clause is the 1991 Moscow Document that was adopted after the attempted coup in Moscow.⁸² It condemns 'forces which seek to take power from a representative government of a participating State against the will of the people as expressed in free and fair elections and contrary to the justly established constitutional order' and directs member states not to recognise the usurping force.⁸³ Further, it provides for support 'in case of overthrow or attempted overthrow of a legitimately elected government of a participating State by undemocratic means' for the legitimate government of the state, which is, according to the 1991 Document, the one upholding human rights, democracy and the rule of law.⁸⁴ The collective defence mechanism was further elaborated in the 1992 Prague Document stating that in 'cases of clear, gross and uncorrected violations of relevant CSCE principles' and 'in order to develop further the CSCE's capability to safeguard human rights, democracy and the rule of law' appropriate action could be taken by either the Council or the Committee of Senior Officials, 'if necessary in the absence of the consent of the State concerned'.⁸⁵ The document was eventually used as a basis for the exclusion of Yugoslavia from participation in the OSCE in July 1992 in response to Yugoslavia's human rights violations in Bosnia and Herzegovina.⁸⁶ The suspension was removed in November 2000 when the FRY was admitted to the OSCE as a new member distinct from the SFRY.⁸⁷ Significantly, the decision to readmit the FRY was made only after the 2000 presidential elections, even though the civil war had ended many years previously.

It is clear from the above analysis that the OSCE's defence mechanism is rather weak, since the enforcement measures are quite limited in scope and do not envisage suspension from the Organisation. Moreover, the above-enlisted

⁸⁰ OSCE, The Charter of Paris for a New Europe (21 November 1990) <<https://www.oscepa.org/documents/all-documents/documents-1/historical-documents-1/673-1990-charter-of-paris-for-a-new-europe/file>> accessed 30 August 2016.

⁸¹ *ibid* 3.

⁸² OSCE, Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (4 October 1991) <<http://www.osce.org/odihr/elections/14310>> accessed 31 August 2016.

⁸³ *ibid* art 17(1).

⁸⁴ *ibid* art 17(2).

⁸⁵ OSCE, Prague Document on Further Development of CSCE Institutions and Structures (31 January 1992) Doc no 2PRAG92.e, para 16.

⁸⁶ See Arie Bloed, *The Conference on Security and Co-Operation in Europe: Analysis and Basic Documents (1972-1993)* (Kluwer Academic Publishers 1993) 938.

⁸⁷ 'Federal Republic of Yugoslavia Joins OSCE' OSCE Press Release (Vienna, 10 November 2000) <<http://www.osce.org/cio/53099>> accessed 27 September 2016.

instruments were adopted as political commitments and do not impose binding obligations. On the other hand, even though the four mentioned documents are not treaties in the meaning of article 31 VCLT, they have been adopted at the level of heads of state or government and through a process of consensus and thus are, as was famously proclaimed by Franck, 'deliberately norm-creating'.⁸⁸ Moreover, the rhetoric of human rights and democracy has had a significant impact on events in the region.⁸⁹

The third framework within which the European system of external defence of democracy has been established is the EU. Set up in 1952 as an engine of economic integration, the EU has evolved to regulate a wide plethora of issues, including human rights and democracy. Article 2 of the Treaty on European Union (TEU) holds that '[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'.⁹⁰ Article 49 TEU restricts membership to any European state 'which respects the values referred to in Article 2 and is committed to promoting them'.⁹¹ The same requirement had already been expressed in the 1993 'Copenhagen criteria' that guided the EU on its enlargement decisions with respect to countries in Central and Eastern Europe. One of these criteria include 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'.⁹² The democracy clause is found in article 7, which provides that in case of 'a serious and persistent breach by a Member State of the values referred to in Article 2', the Council may decide to suspend certain of the rights of the implicated state, including the voting rights.⁹³ As the Commission itself clarified, the scope of article 7 is not confined to violations of EU law but also covers violations in areas of member states' national jurisdiction.⁹⁴ Moreover, whilst the enforcement of the European law provisions is almost uniquely relied on individual litigations, article 7 TEU is targeted at more systematic problems, such as democratic backsliding.

This mechanism has been applied in 2000 with respect to Austria for allowing Jörg Haider's ultra-rightist Freedom Party (FPÖ) to participate in the country's government. The EU reacted by minimising bilateral relations with the Austrian government integrating the FPÖ and calling on not to promote Austrian candidates for positions in international organisations. Moreover, the

⁸⁸ Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 AJIL 46, 67.

⁸⁹ See generally Daniel C Thomas, *The Helsinki Effect: International Norms, Human Rights and the Demise of Communism* (Princeton UP 2001).

⁹⁰ Consolidated Version of the Treaty on European Union, Off J EU, C 326/13 (26 October 2012) art 2.

⁹¹ *ibid* art 49.

⁹² 'Conclusions of the Presidency at the Copenhagen Council 1993' (1993) 6 EC Bulletin 7, 13.

⁹³ Consolidated Version of the Treaty on European Union, Off J EU, C 326/13 (26 October 2012) art 7.

⁹⁴ Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union — Respect for and Promotion of the Values on Which the Union is Based, COM/2003/0606 (Brussels, 15 October 2003) 5.

European Commission announced it would implement article 7 suspension mechanism if necessary. The sanctions were lifted upon the Party's leaders renouncing their positions in the government.⁹⁵ The mechanism was again tested in Hungary in 2010, when the right-wing populist party led by Viktor Orbán began to abuse its majority by restricting democratic checks and balances, and in Romania in 2012, when Prime-Minister Victor Ponta staged an impeachment coup against President Traian Băsescu.⁹⁶ In both cases, the EU has reacted in rather unassertive and partial manner. Whilst it condemned certain encroachments on democracy, it let others remain unchallenged. Moreover, in neither case was article 7 invoked. The same holds true for the Brussels 'soft' policy with regard to other cases of extreme-right populism in Europe, including the Netherlands (2010), France (2012), Greece (2012) and Italy (2013).⁹⁷ Such reluctance on the part of the EU to sanction states experiencing democratic backsliding has been explained by the lack of will of the member states fearing that these sanctions might one day be turned against them too. '[T]he ponderous nature of the procedure and the stigmatization inherent in Article 7 TEU put the political stakes very high'.⁹⁸ Moreover, the very idea of sanctions is incompatible with the EU's policy of diversity and pluralism. It has been also asserted that the EU's policy of intervention is based less on broad principles of human rights and democracy and more on practical considerations of neoliberal economics.⁹⁹ All in all, article 7 democratic clause does not envisage intervention as such, rather 'it enables a kind of *moral quarantine*' as it can only effect 'normative isolationism' of the EU and its member states with respect to the non-complying state.¹⁰⁰

In view of the inefficacy of the article 7 mechanism, it has been suggested that systemic violations of the article 2 TEU values amount to infringements of article 20 of the Treaty on the Functioning of the European Union (TFEU) enlisting EU citizenship rights and can thus be defended by national courts in

⁹⁵ Anna Van der Vleuten and Andrea Riberio Hoffmann, 'Explaining Enforcement of Democracy by Regional Organizations: Comparing EU, Mercosur and SADC' (2010) 48 J Com Mar St 737, 744-45.

⁹⁶ See Jan-Werner Müller, 'Defending Democracy Within the EU' (2013) 24 Journal of Democracy 138, 139-40.

⁹⁷ For a more comprehensive overview, see European Humanist Federation, 'The European Union and the Challenge of Extremism and Populism: How to Protect Democracy and the Rule of Law in Europe' (October 2013) <http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/24.europeanhumanistfederationtheeuandthechallengeofextremismandpopulism_ehf_en.pdf> accessed 2 August 2016.

⁹⁸ Armin von Bogdandy and others, 'Reverse Solange — Protecting the Essence of Fundamental Rights Against EU Member States' (2012) 49 CML Rev 489, 493.

⁹⁹ Jan-Werner Müller, 'Defending Democracy Within the EU' (2013) 24 Journal of Democracy 138, 141. See also Jan-Werner Müller, 'The EU as a Militant Democracy, or: Are There Limits to Constitutional Mutations within EU Member States?' (2014) 165 Revista de Estudios Políticos 141, 152-53.

¹⁰⁰ Jan-Werner Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21 ELJ 141, 144.

cooperation with the European Court of Justice (ECJ).¹⁰¹ As the Court declared in *Ruiz Zambrano*, ‘Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union’.¹⁰² The ‘substance’ of the citizenship rights may, as the argument runs, be defined through the lens of article 2 TEU. It follows that breaches of values referred to in article 2, even within the framework of matters falling under national jurisdiction, can be considered as an infringement of the substance of EU citizenship and can thus be adjudicated by national courts, which, in their turn, would engage the Court of Justice to clarify the meaning of articles 2 TEU and 20 TFEU.¹⁰³ Although this procedure puts the politicised article 7 mechanism into the realm of law, it is dubious how such abstract principles as democracy or the rule of law can be enforced through individual litigations, unless they are framed as demands to remedy violations of concrete civil and political rights.

Another EU’s democracy-defending mechanism can be derived from articles 258-260 TFEU, which authorise the Commission and member states to initiate infringement proceedings against any EU member state for non-compliance with European law. If political dialogues between the parties fail, the Commission can take the case before the Court of Justice of the EU (CJEU), which, in case of violation, can proscribe the deviant state necessary measures to comply with its judgment. If the state concerned has not complied with the judgment, the Court may impose a lump sum or penalty on it.¹⁰⁴ The recent case law of the CJEU reveals that the Commission invoked not only violations of specific provisions but also ‘general practice contrary thereto’.¹⁰⁵ This novel application of infringement actions in order to counter general and persistent violations may serve ‘a middle ground between the Article 7 TEU

¹⁰¹ Armin von Bogdandy and others, ‘Reverse Solange — Protecting the Essence of Fundamental Rights Against EU Member States’ (2012) 49 CML Rev 489, 501.

¹⁰² Case C-34/09 *Gerardo Ruiz Zambrano v Office National de l’Emploi (ONEm)* [2011] ECR I-01177, para 42.

¹⁰³ Armin von Bogdandy and others, ‘Reverse Solange — Protecting the Essence of Fundamental Rights Against EU Member States’ (2012) 49 CML Rev 489, 490, 451.

¹⁰⁴ Consolidated Version of the Treaty on the Functioning of the European Union, Off J EU, C 326/49 (26 October 2012) arts 258-60.

¹⁰⁵ The paradigmatic case is Case C-494/01 *Commission of the European Communities v Ireland* [2005] ECR I-03331, para 27 (‘[W]ithout prejudice to the Commission’s obligation to satisfy in each and every case the burden of proof which it bears, in principle nothing prevents the Commission from seeking in parallel a finding that provisions of a directive have not been complied with by reason of the conduct of a Member State’s authorities with regard to particular specifically identified situations and a finding that those provisions have not been complied with because its authorities have adopted a general practice contrary thereto [...]’). For a broader analysis of this and similar cases see Pål Wennerås, ‘A New Dawn for Commission Enforcement under Articles 226 and 228 EC: General and Persistent Infringements, Lump Sums and Penalty Payments’ (2006) 43 CML Rev 31, 33-50.

procedure and the classic [individual-instigated] use of Article 258 TFEU'.¹⁰⁶ It this way, it could address situations in which 'non-compliance can only be redressed by a revision of the general policy and administrative practice of the Member State'.¹⁰⁷ The issues of democratic dismantlement and breakdown fall neatly within these schemata. However, akin to the article 7 procedure, this mechanism has been criticised for being heavily politicised. The mechanism's significant informal dimension is extremely prone to political manipulation and 'horse-trading'.¹⁰⁸

The European region is unique for its high and heterogeneous level of institutionalised cooperation in a wide spectrum of activities. The tripartite system of regional integration — the CoE, the OSCE and the EU — produced a multitude of specific obligations with respect to protection of democracy. The underlying feature of the European system of defence of democracy is its endorsement of substantive democracy — which apart from free and fair elections includes the principles of the rule of law and protection of human rights — and the attendant sensitivity to democratic threats falling short of traditional coups. As to the overall effectiveness of the regime, it is germane to point to the fact that the significant overlap in membership across these institutional arrangements as well as the cross-organisational interplay have generated greater levels of commitment and compliance with the democratic norms. Extreme cases of democratic disruptions, such as military coups, are rare and when they do occur the reactions of the European community are assertive and unequivocal. On the other hand, the enforcement of democratic clauses across the three forums is not immune from flaws. The CoE, which is a leading human rights organisation in Europe including 47 members, has a weak system of oversight which ultimately relies on the will of member states. The democratic clause of its constitutive document has as a matter of fact never been employed. The cases when it was invoked date back to the 1960s-1970s outright democratic reversals, with the recent cases of democratic erosion being largely unnoticed. The ECHR's mechanism to deal with threats to democracy is highly sensitive to even minor democratic disruptions but it was designed to remedy individual violations rather than system's failures and relies heavily on the will of member states. Another pillar of European cooperation with the most comprehensive geographical coverage (57 member states), the OSCE, is based solely on political commitments with minimal supervision mechanisms. Whilst, on the account of some scholars, these commitments were deliberately created to serve as authoritative rules, the democratic clause of the Organisation's Moscow Document has never been

¹⁰⁶ Mark Dawson and Elise Muir, 'Individual, Institutional and Collective Vigilance in Protecting Fundamental Rights in the EU: Lessons from the Roma' (2011) 48 CML Rev 751, 764ff.

¹⁰⁷ Opinion of Advocate General Geelhoed delivered on 23 September 2004 in Case C-494/01 *Commission of the European Communities v Ireland* [2005] ECR I-03331, para 4.

¹⁰⁸ Mark Dawson and Elise Muir, 'Individual, Institutional and Collective Vigilance in Protecting Fundamental Rights in the EU: Lessons from the Roma' (2011) 48 CML Rev 751, 756.

applied in practice. Finally, the EU has established the most developed institutional mechanism to monitor and enforce the implementation of its rules, including the mandate to pass judgment on the extent to which states are in compliance with their obligations under European law. Yet, its membership is limited to 28 states, and political and economic considerations all too often take primacy over democratic commitments.

5.3. ‘Intervention without Intervening’: The American Model of Collective Defence of Democracy

Until the late 1960s, Latin America was the most unstable region in the world, where army cliques overthrew governments as well as each other with astounding frequency. From the mid-1970s and up to the early 1990s, the region witnessed the ‘third wave’ of democratisation when the number of elected governments expanded to an unprecedented scale.¹⁰⁹ Following these developments, American states embarked upon a task of modernisation of the OAS system with a view to strengthen its capacity in democracy promotion, including defence of democratic order against authoritarian threats.

The first well-documented instance of democracy promotion in the American hemisphere is the exclusion of Cuba from the OAS in 1962 due to the alleged incompatibility of a Marxist-Leninist government in Cuba with the inter-American system: ‘The present connections of the Government of Cuba with Sino-Soviet bloc of countries are evidently incompatible with the principles and standards that govern the regional system, and particularly with the collective security established by the Charter of the Organization of American States and the Inter-American Treaty of Reciprocal Assistance’.¹¹⁰ However, after the forty-seven-year ban, Cuba was readmitted to the OAS, which, in turn, declared that the 1962 resolution ‘ceases to have effect’.¹¹¹

Since the Cuba case, it took decades before the OAS seriously embarked upon its mission of democracy promotion in the American continents. The American collective system of defence of democracy has been institutionalised through four important documents: the 1991 Santiago Commitment, 1991 Resolution 1080, the 1992 Protocol of Washington, an amendment to the OAS Charter, which altogether became to be known as ‘Santiago Commitment’ or ‘Santiago Doctrine’,¹¹² and the 2001 Inter-American Democratic Charter

¹⁰⁹ See Samuel P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991) 13-25.

¹¹⁰ Organization of American States, ‘Exclusion of the Present Government of Cuba from Participation in the Inter-American System’ (22-31 January 1962) (1962) 56 AJIL 610.

¹¹¹ Organization of American States, ‘Resolution on Cuba’ General Assembly Resolution AG/RES 2438 (XXXIX-0/09) (San Pedro Sula, 9 June 2009) para 1.

¹¹² Stephen F Schably, ‘Constitutionalism and Democratic Government in the Inter-American System’ in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 162-64.

(IADC). Under the 1991 Santiago Commitment to Democracy and Renewal of the Inter-American System, the OAS, ‘mindful that representative democracy is the form of government of the region,’ committed itself to ‘the defense and promotion of representative democracy’.¹¹³ The generic language of the Declaration does not reveal any concrete means of democratic defence. Moreover, the relevant provisions must be weighed against the Organisation’s conventional principles of self-determination and non-intervention.¹¹⁴

The same year, the OAS General Assembly adopted Resolution 1080 ‘Representative Democracy’. Whilst the principle of non-intervention again explicitly features in the text of the Resolution, it is not unqualified and shall be put aside ‘in the event of any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government of the Organization’s member states’.¹¹⁵ On top of that, the Resolution instructs the Secretary General to immediately convene a meeting of the Permanent Council should such interruption of the legitimate order occur. The Council would then examine the situation and convene a meeting of the Ministers of Foreign Affairs or a special session of the General Assembly within a ten-day period. In either forum, states would look into the events collectively and adopt any decisions deemed appropriate in accordance with the OAS’s Charter and international law.¹¹⁶ It was for the first time that the OAS was provided with an automatic and rapid-response mechanism against *coups d’état*. In evaluating the significance of Resolution 1080, Pastor claimed that by adopting it ‘the governments of the Americas sidestepped Article 18 [now Article 19] of the OAS Charter [prohibiting any form of interference into domestic matters of states]’ and commenced a journey ‘toward a collective defense of democracy’.¹¹⁷ For Graham, it was an extraordinary change, since ‘[n]o regional organization outside Western Europe and not even the United Nations had struck out so boldly for the values of democratic governance’.¹¹⁸

The Resolution 1080 mechanism of the external defence of democracy was invoked for several times. The earliest and most prominent example is the 1991 Haiti crisis when the democratically elected President Jean-Bertrand Aristide was overthrown by a military coup on 13 September 1991. The coup led not only to a regional response but also occasioned the military involvement of the

¹¹³ Organization of American States, ‘The Santiago Commitment to Democracy and Renewal of the Inter-American System’ General Assembly Res AG/Res (XXI-O/91) (4 June 1991).

¹¹⁴ *ibid.* See also Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3, arts 3(e) and 19.

¹¹⁵ Organization of American States, ‘Representative Democracy’ General Assembly Res AG/Res 1080 (XXI-O/91) (5 June 1991).

¹¹⁶ *ibid.*

¹¹⁷ Robert Pastor, ‘A Community of Democracies in the Americas — Instilling Substance into a Wondrous Phrase’ (2003) 10 Can Foreign Pol J 15, 15.

¹¹⁸ John Graham, *A Magna Carta for the Americas: The Inter-American Democratic Charter: Genesis, Challenges and Canadian Connections* (Focal 2002) 3.

UN for the restoration of democracy.¹¹⁹ Despite the reference in UNSC Resolution 841 to an ‘exceptional and unique situation’ in Haiti and the subsequent statements that the resolution in question did not constitute a precedent, this was the first time when a purely internal political crisis occasioned such a drastic response. The collective defence mechanism was again applied in Peru in 1992¹²⁰ and Guatemala in 1993,¹²¹ when the interruptions of the constitutional rule were caused not by a military putsch but by means of *autogolpe*, as well as in Venezuela (1992)¹²² and Paraguay (1996)¹²³ after the attempted *coups d’état* against the incumbent presidents.¹²⁴

Resolution 1080 is a breakthrough but it is not unique. Other resolutions contain even more broad commitments with respect to undemocratic interruptions. For instance, the 1990 Declaration of Asuncion proscribes ‘all forms of intervention with the free expression of the popular will’,¹²⁵ whereas in the 1992 Declaration of Nassau, aimed to complement and give effect to the provisions of Resolution 1080, the OAS declares its ‘strongest and most categorical rejection of any attempt against the democratic institutional order in any of the member states’.¹²⁶ The obvious weakness of Resolution 1080 is that by virtue of being a ‘mere’ resolution of the General Assembly it is only of a recommendatory character, not to mention its lack of precision as to the concrete measures in response to democratic interruptions. This notwithstanding, its impact on the further development of the proactive attitude against democratic disruptions in the Americas is hard to overstate.

The Santiago Doctrine’s sanction mechanism was consolidated in December 1992 with the adoption of the Protocol of Washington. The Protocol amended the OAS Charter by inserting a new article bestowing the Organisation with the power to suspend the participation in the Organisation’s policy-making bodies of a member state whose ‘democratically constituted

¹¹⁹ UNSC Res 841 (16 June 1993) UN Doc S/RES/841; UNSC Res 940 (31 July 1994) UN Doc S/RES/940. See also Organization of American States, ‘International Presence in Haiti’ General Assembly Res AG/RES 1373 (XXVI-O/96) (6 June 1996).

¹²⁰ Organization of American States (Permanent Council) ‘The Situation in Peru’ CP/RES 579 (897/92) (6 April 1992) 1 (The Permanent Council ‘deplore[d] the events that have taken place in Peru’ and ‘urge[d] the authorities in that country to immediately reinstate democratic institutions and full respect for human rights under the rule of law’).

¹²¹ Organization of American States (Permanent Council) ‘The Situation in Guatemala’ CP/RES 605 (945/93) (25 May 1993) (Repeats *verbatim* the resolution on Peru).

¹²² Omar G Encarnacion, ‘Venezuela’s “Civil Society Coup”’ (2002) 19 Wld Policy J 38.

¹²³ Arturo Valenzuela, ‘Paraguay: The Coup that Didn’t Happen’ (1997) 8 Journal of Democracy 43.

¹²⁴ For a brief overview of each case, refer to Jennifer L McCoy, ‘Challenges for the Collective Defense of Democracy on the Tenth Anniversary of the Inter-American Democratic Charter’ (2012) 3 LAP 33, 46-55; See also Barry S Levitt, ‘A Desultory Defense of Democracy: OAS Resolution 1080 and the Inter-American Charter’ (2006) 48 Latin American Pol & Soc 93, 102-06.

¹²⁵ Organization of American States, Declaration of Asuncion, General Assembly Res AG/RES 1064 (XX-O/90) (8 June 1990).

¹²⁶ Organization of American States, Declaration of Nassau, General Assembly Res AG/DEC 1 (XXII-0/92) (19 May 1992).

government has been overthrown by force'. The power to suspend is to be exercised only after diplomatic means to resolve the issue have failed and only following an affirmative vote of the two-thirds of the member states.¹²⁷ Given the binding nature of the Protocol and its detailed and unequivocal reaction mechanism, it was 'the first time in the organization's history, [that] a particular domestic political circumstance — the interruption of democratic government — is declared to be grounds for collective action'.¹²⁸ For Roth, this development signified a more general trend whereby the adherence to due constitutional process is now regarded as the *conditio sine qua non* of legitimate government, with the effective control doctrine being put aside.¹²⁹

The Santiago Doctrine became a building block for the adoption of the 2001 Inter-American Democratic Charter¹³⁰ — 'the most complete inter-American instrument enacted to date for promoting democratic practices in the states of Hemisphere'¹³¹ and, thus, the most significant document on democracy in the Americas. It was adopted as a response to the emergence of new, 'more sophisticated' than the conventional military coups, ways of usurpation of constitutional processes, which came to be known as *autogolpes* (American term for executive coup). It states that 'an unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state constitutes [...] an insurmountable obstacle to its government's participation' in the political bodies of the Organisation.¹³² This provision expanded the democracy clauses of Resolution 1080 and article 9 of the OAS Charter, which only referred to the traditional overthrow by force of a democratically constituted government, to include the cases of *autogolpes* and 'impeachment coups' and, hence, finalised the 'conditionalisation' of the notion of sovereignty in the Inter-American system. More importantly, should 'unconstitutional interruption' or 'unconstitutional alteration' occur, article 20 IADC provides for a collective action whereby any member state or the Secretary General may request the immediate convocation of the Permanent Council, which, in its turn, may undertake the necessary diplomatic initiatives. If such initiatives fail, the Permanent Council is to promptly convene a special session of the General Assembly, which shall adopt decisions it deems

¹²⁷ OAS, Protocol of Amendments to the Charter of the Organization of American States (A-56) 'Protocol of Washington' (adopted 14 December 1992, entered into force 25 September 1997) OAS Treaty Series No A-56, art 9.

¹²⁸ Viron P Vaky, 'The Organization of American States and the Multilateralism in the Americas' in Heraldo Munoz and Viron P Vaky (eds), *The Future of the Organization of American States* (Brookings Institution 1993) 23.

¹²⁹ Brad Roth, 'Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine' (2010) 11 Melbourne J Int'l L 393.

¹³⁰ OAS, Inter-American Democratic Charter, OEA/Ser.G/CP-1 (11 September 2001).

¹³¹ Secretary General Insulza, Report of the Secretary General Concerning Compliance with Operative Paragraph 3 of Resolution AG/RES 2480 (XXXIX-O/09) 'Promotion and Strengthening of Democracy: Follow-Up to the Inter-American Democratic Charter', CP/doc.4487/10 (6 May 2010).

¹³² OAS, Inter-American Democratic Charter, OEA/Ser.G/CP-1 (11 September 2001) art 19.

appropriate in accordance with the IADC, the OAS Charter and international law.¹³³ Article 21 of the Charter invests the General Assembly with the power to suspend the member state whose democratic regime is, in the view of the Assembly, altered or interrupted.

Since the IADC was adopted as a general assembly resolution, it is, according to the majority view, not a treaty and, consequently, not binding. However, the binding nature of this instrument can still be defended. The preamble of the Charter acknowledges ‘the progressive development of international law and the advisability of *clarifying the provisions set forth in the OAS Charter*’.¹³⁴ It seems that the member states have recognised it as an interpretation of the OAS’s democracy clause. Pursuant to article 31(3) of the 1969 VCLT, in treaty interpretation ‘[t]here shall be taken into account, together with the context: a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions’.¹³⁵ It follows that the IADC has the same binding force as the OAS Charter which it interprets; it is binding because it constitutes a normative development of the OAS Charter’s provisions. This conclusion is shared by many American analysts.¹³⁶ This argument becomes, however, more attenuated with respect to states that have not ratified the Washington Protocol unless one accepts that the democracy clause has become a regional customary norm in the Americas.

The IADC was referred to on various occasions, including Venezuela (2002), Haiti (2004 and 2010), Ecuador (2005 and 2010), Belize (2005), Nicaragua (2005), Bolivia (2008) and Guatemala (2009) crises. In all these cases, the responses of the OAS were quite soft and were largely limited to diplomacy.¹³⁷ Yet, the most serious test of the IADC took place with the 2009 impeachment coup against Honduran President Manuel Zelaya in response to his call for a referendum to rewrite the constitution, which would lead, in the opinion of many, to the extension of his tenure. Zelaya was arrested on charges of treason and abuse of power and substituted with the President of Congress Roberto Micheletti. The procedure was allegedly in accordance with the

¹³³ *ibid* art 20.

¹³⁴ *ibid* preamble (emphasis added).

¹³⁵ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 33 (VCLT) art 31(3).

¹³⁶ For an extensive overview of political and scholarly opinions defending the binding nature of the Inter-American Democratic Charter as an interpretation of the OAS Charter, see Timothy D Rudy, ‘A Quick Look at the Inter-American Democratic Charter of the OAS: What Is It and Is It “Legal”?’ (2005) 33 *Syracuse J Int’l L & Com* 237, 241-42; Jean-Paul Hubert, ‘Follow-Up on the Application of the Inter-American Democratic Charter’ (OAS/Ser. Q, CJI/doc.317/09 corr.1, Bogota, 19 March 2009) 11, 18-19; Vasiliki Saranti, ‘A System of Collective Defense of Democracy: The Case of Inter-American Democratic Charter’ (2011) 3 *Goettingen J Int’l L* 675, 695. Compare with Jean d’Aspremont, ‘La Licéité des Coups d’État en Droit International’ in *Société Française pour le Droit International* (ed), *L’État de Droit en Droit Internationale* (Pedone, 2009) 129.

¹³⁷ For a more detailed overview, see Vasiliki Saranti, ‘A System of Collective Defense of Democracy: The Case of Inter-American Democratic Charter’ (2011) 3 *Goettingen J Int’l L* 675, 702; Jorge Heine and Brigitte Weiffen, *21st Century Democracy Promotion in the Americas: Standing Up for the Polity* (Routledge 2015) 83-96.

Honduran Constitution. This notwithstanding, the OAS vehemently condemned the *coup d'état*, 'which has produced an unconstitutional alteration of the democratic order', and made clear that no government arising from the coup would be recognised.¹³⁸ Thereafter, a special session of the OAS General Assembly was convened in order 'to take whatever decisions it considered appropriate in accordance with the OAS Charter, international law and the provisions of the IADC'.¹³⁹ On 4 July 2009, Honduras was suspended from participation in the OAS¹⁴⁰ and member states imposed a range of sanctions on the Micheletti regime, including closure of diplomatic relations and financial cuts. Notwithstanding these measures, the ousted President Zelaya was never reinstated, and the *de facto* regime remained in power until the next elections, which were admittedly used to consolidate its position. Regardless of the apparent fiasco of the OAS to reinstall the legitimate president, after the 1991 Haitian crisis the OAS's response to the Honduran coup was the most powerful in terms of the scope of international condemnation, isolation and sanctioning of the *golpistas*. It 'established a fundamental precedent: an attack on democracy in the region entails high political, economic, and diplomatic costs'.¹⁴¹

Whilst the significance of the IADC is hard to overestimate, it is not unproblematic. According to one account, the IADC proved to be a 'paper tiger'.¹⁴² It has teeth to intervene but in practical terms they have provided little support for the ousted regimes. Moreover, the Charter's democracy clause is like a half-full and half-empty glass, since it does not envisage a solution to a situation when the punitive government was suspended from the Organisation but reneged upon its obligation to put democracy back on track, as the Honduran crisis evidences. Another principle limitation of the Charter concerns the lack of a clear definition of what constitutes an alteration or interruption of constitutional process, which may imperil the effective response by the OAS. As Legler points out, there is

[A]n important magnitude issue at play; [...] it is unclear what antidemocratic measures are serious enough violations of the Democratic Charter to warrant OAS action; were the OAS to respond to every minor infraction of the

¹³⁸ Organization of American States (Permanent Council), 'Current Situation in Honduras' CP/RES 953 (1700/09) (28 June 2009). See also Detlef Nölte, 'Verfassungsreformen und Verfassungskrise in Honduras in Vergleichender Perspektive' (2010) 43 VRÜ 1.

¹³⁹ Organization of American States (Permanent Council), 'Current Situation in Honduras' CP/RES 953 (1700/09) (28 June 2009) para 6.

¹⁴⁰ Organization of American States, 'Suspension of the Right of Honduras to Participate in the Organization of American States' General Assembly Res AG/Res 2 (XXXVII-E/09) (Washington DC, 4 July 2009).

¹⁴¹ Jose Miguel Insulza, 'Secretary General of the Organization of American States Hemispheric Commemoration of the 10th Anniversary of the Inter-American Democratic Charter and Renewal of the Commitment of the Americas to Democracy' (Valparaiso, 3 September 2011) <http://www.oas.org/en/media_center/speech.asp?sCodigo=11-0144> accessed 26 July 2016.

¹⁴² Pedro Paramo, 'Honduras y la mama hora de America Latina' (2010) 226 Nueva Sociedad 115, 122 cited by Thomas Legler, 'The Democratic Charter in Action: Reflections of the Honduran Crisis' (2012) 3 LAP 74, 75.

Democratic Charter, it would need to intervene constantly in its Member States' internal affairs to defend democracy; yet by choosing not to respond to minor transgression and to focus only on major threats, the OAS runs the risk of allowing the incremental erosion of democracy, or its "death-by-a-thousand-cuts".¹⁴³

The lack of a broad definition leads to the existence of grey areas that limit the scope of application of the IADC to only the most transparent cases, such as military coups and *autogolpes*, whereas the cases of electoral fraud or minor constitutional irregularities remain largely unnoticed, the present case of communist Cuba being but one example. It is, thus, fair to suggest that the OAS prioritises constitutional facade over the quality of democratic institutions. Another characteristic feature of the OAS's coup policy is the Organisation's selectivity with regard to when and to what extent it applies the IADC's democracy clause. Whereas in Honduras and to a certain degree in Venezuela, the formal mechanisms were employed, including sanctions and membership suspension, the responses to democratic backsliding in other cases were marked by relying on informal measures. The paradigmatic case is the 2004 Haitian crisis. Whilst the overthrow of the President Aristide in the 1991 coup was strongly and swiftly condemned up to the resort to military force, the 2004's reaction of the international community (including the OAS itself) to the second ouster of this very president was much more lukewarm as no formal mechanisms were utilised.¹⁴⁴ It means that the OAS treats *coups d'état* differently: instead of an automatic and uniform condemnation of every coup, the OAS looks first at the legitimacy of the toppled regime and shapes its policy of response accordingly. Whilst for some scholars such selectivity is problematic,¹⁴⁵ it is nevertheless fair to underscore the flexibility and sensitivity to local idiosyncrasies that this approach obtains, particularly if one accepts an idea that certain coups are better than others.¹⁴⁶

Finally, the actionability and effectiveness the OAS's mechanism of the external defence of democracy is obfuscated by the fact that the principle of non-intervention is still one of the leading principles of the OAS and is in a clear tension with the latter's democracy clauses. The OAS Charter unequivocally prohibits all states from intervening 'directly or indirectly, for

¹⁴³ Thomas Legler, 'The Inter-American Democratic Charter: Rhetoric or Reality' in Thomas Legler, Sharon F Lean and Dexter S Boniface (eds), *Promoting Democracy in the Americas* (John Hopkins UP 2007) 122.

¹⁴⁴ See David S Berry, 'Non-Democratic Transitions: Reactions of the OAS and CARICOM to Aristide's Departure' (2005) 33 *Syracuse J Int'l L & Com* 249, 256.

¹⁴⁵ See Craig Arceneaux and David Pion-Berlin, 'Issues, Threats, and Institutions: Explaining OAS Responses to Democratic Dilemmas in Latin America' (2007) 49 *Latin American Pol & Soc* 1, 2.

¹⁴⁶ See generally Francis N Ikome, 'Good Coups and Bad Coups: The Limits of the African Union's Injunction on Unconstitutional Changes of Power in Africa' (2007) *Institute for Global Dialogue Occasional Paper No 55* <http://igd.org.za/jdownloads/Occasional%20Papers/igd_occasional_paper_55.pdf> accessed 31 August 2016

any reason whatever, in the internal or external affairs of any other State'¹⁴⁷ and affirms that '[e]very State has the right to choose, without external interference, its political, economic, and social system and to organize itself in the way best suited to it'.¹⁴⁸ How this language of neutrality with respect to member states' domestic politics is to be reconciled with the provisions of the IADC having a direct bearing on clearly 'internal' constitutional affairs of states is still a matter of debate. Indeed, such a sovereignty-versus-democracy clash is one of reasons why some scholars came to characterise the OAS's mechanism of collective action in response to democratic interruptions as 'intervention without intervening'.¹⁴⁹

5.4. Military Defence of Democracy in Africa

The African region developed one of the most robust systems of the collective defence of democracy. Albeit the continent is generally known as a gatekeeper of the principles of sovereignty, territorial integrity and non-interference into the domestic matters of states,¹⁵⁰ the one exception relates to unconstitutional changes of government by *coup d'état*, which have been regarded by African regional organisations, the Organisation for African Unity (OAU) and its successor since 2003 the African Union (AU), as a threat to the regional security and economic development.¹⁵¹ However, they were not the pioneers in the development of the regional norm of non-tolerance of unelected regimes in Africa. The first steps were taken by the African Commission on Human

¹⁴⁷ Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3, art 19.

¹⁴⁸ *ibid* art 3(e).

¹⁴⁹ Andrew Cooper and Thomas Legler, *Intervention Without Intervening? The OAS Defense and Promotion of Democracy in Americas* (Palgrave Macmillan 2006).

¹⁵⁰ The defence of the mentioned principles is a stated purpose of the OAU and an objective of the AU. Charter of the Organization of African Unity (adopted 25 May 1963, entered into force 13 September 1963) 479 UNTS 39, art II(1)(c); Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3, art 3(b). See also Paul D Williams, 'From Non-Intervention to Non-Indifference: The Origin and Development of the African Union's Security Culture' (2007) 106 *Afr Aff* 252.

¹⁵¹ Importantly, institutional layouts of, and actions by, African sub-regional economic communities are not taken separately in this thesis but are rather considered as a part of the AU's framework, since states making up these communities are also members of the AU. However, see ECOWAS, Protocol on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (21 December 2001) ECOWAS Doc A/SP1/12/01, art 1 (Asserts 'zero tolerance for power obtained or maintained by unconstitutional means'); NEPAD, Declaration on Democracy, Political, Economic and Corporate Governance signed by Heads of State and Government of the Member States of the African Union (8 July 2002) OAU/AU Doc AHG/235 (XXXVIII) Annex 1, para 13 (Provides that 'in support of democracy and the democratic process', the Member States of the AU will 'enforce strict adherence to the position of the African Union (AU) on unconstitutional changes of government and other decisions of our continental organization aimed at promoting democracy, good governance, peace and security').

and Peoples' Rights (ACmHPR). Because the wording of the African Charter on Human and Peoples' Rights (ACHPR)¹⁵² is substantially narrow, the African Commission followed the lead of the Inter-American Commission on Human Rights in elaborating the terms of the Charter in both its declarations and individual cases. In a *Resolution on the Military*, the Commission recognised 'the trend world-wide in Africa in particular to condemn military take-overs and the intervention by the military in politics', affirmed that 'the best government is one elected by, and accountable to, the people' and upheld that 'the forcible take-over of government by Army civilian or military group contravenes Articles 13(1) and 20(1) of the [...] ACHPR'.¹⁵³

These principles were eventually applied in the Commission's case law. In *Constitutional Rights Project and Civil Liberties Organization v Nigeria*, where the Federal Military Government announced the annulment of the 1993 presidential election results in Nigeria, the Commission acknowledged that such an annulment constituted a coup and was in violation of article 13(1) ACHPR, which provides for every citizen's right to participate in the government of his country.¹⁵⁴ Similar verdict was given by the ACmHPR in *Sir Dawda K Jawara v The Gambia*, in which the complainant, the former Head of State of the Republic of The Gambia Dawda Jawara, brought the question of the legality of the 1994 military coup that overthrew his government. The Commission found that the coup was 'a grave violation of the right of Gambian people to freely choose their government as entrenched in Article 20(1) of the Charter'.¹⁵⁵ Since then, the African Commission continued to issue resolutions condemning military usurpation of constitutional processes. In its *Resolution on the Political Situation in Niger*, it affirmed that 'coups d'état are, in essence, human rights violations, characterized by denial of civil and political rights as well as economic stagnation in the countries'.¹⁵⁶

¹⁵² African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (ACHPR).

¹⁵³ The African Commission on Human and Peoples' Rights meeting at its 16th Ordinary Session (Banjul, 25 October - 3 November 1994) <<http://www.achpr.org/sessions/16th/resolutions/10/>> accessed 14 July 2016.

¹⁵⁴ *Constitutional Rights Project and Civil Liberties Organization v Nigeria* (2000) AHRLR 191 (ACHPR 1998) paras 47-48.

¹⁵⁵ *Sir Dawda K Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 73.

¹⁵⁶ The African Commission on Human and Peoples' Rights meeting at its 8th Extraordinary Session (Banjul, 22 February - 3 March 2010) <<http://www.achpr.org/sessions/8th-eo/resolutions/162/>> accessed 14 July 2016; See also 'Resolution on the Situation in Comoros', the ACmHPR meeting at its 25th Ordinary Session (Bujumbura, 26 April - 5 May 1999) <<http://www.achpr.org/sessions/25th/resolutions/34/>> accessed 14 July 2016 ('Recognising that the take-over of power by force is contrary to the provisions of articles 13(1) and 20(1) of the African Charter on Human and People's Rights and that accession to power by military regimes through coups d'état constitutes an intolerable infraction of the democratic principles of the rule of law'); 'Resolution on the Human Rights Situation in the Republic of the Gambia', the ACmHPR's meeting at its 44th Ordinary Session (Abuja, 10-24 November 2008) <<http://www.achpr.org/sessions/44th/resolutions/134/>> accessed 14 July 2016 ('Strongly condemning the attempted Coup d'état of March 2006 in The Gambia and calling on all Africans

The turning point occurred on 25 May 1997 when the government of President Ahmed Tejan Kabbah was overthrown by a group of soldiers from the Sierra Leone Army. The ECOWAS, backed-up with the support of the OAU, militarily intervened to Sierra Leone and reinstalled the legitimate president. Similar responses towards military coups followed in the Comoros, Ivory Coast and Niger.¹⁵⁷ Against the backdrop of a new wave of military usurpations of power in Africa and a need to articulate a general policy against military politics, the member states of the OAU issued the 2000 Lomé Declaration, in which they recognised *coups d'état* as a threat to peace and security of the continent and as a flagrant violation of the basic principles of the Organisation and the UN. In addition, the Declaration set up a mechanism of collective response to an unconstitutional seizure of government power, whereby the implicated government is required to restore its constitutional order within six months. During this period, such government cannot participate in the policy-making organs of the Organisation. If it does not comply with this obligation, the Organisation may then institute sanctions, including visa denials, restrictions of intergovernmental contacts and trade limitations.¹⁵⁸

This mechanism has been applied on several occasions. In 2003, the Central African Republic was precluded from participating in the work of the AU following the military overthrow of the democratically elected president Ange-Felix Patasse. The Central African Republic was only allowed to resume its participatory rights when presidential elections were held in 2005. Other cases when the AU condemned anticonstitutional putsches in accordance with the Lomé mechanism include Sao Tome and Principe (2003) and Guinea-Bissau (2003).¹⁵⁹ Importantly, the deterrent effect of the Lomé Declaration on potential coup-plotters is hard to overlook, because since its adoption the number of successful coups dropped sharply.¹⁶⁰ Moreover, following the adoption of the Declaration, all coup-plotters began to employ the language of democracy and attempted to legitimate their power by committing themselves to restore the constitutional order. Such altered patterns of behaviour displayed

to respect the provisions of the Constitutive Act of the African Union which in Article 4 (p) states as one of its principles, "condemnation and rejection of unconstitutional changes of government").

¹⁵⁷ See Tiyanjana Maluwa, 'The Constitutive Act of the African Union and Institution-Building in Postcolonial Africa' (2003) 16 LJIL 157, 165.

¹⁵⁸ Organization of African Unity, Lomé Declaration on the Framework for the OAU Response to Unconstitutional Changes of Government (Togo, 10-12 July 2000) AHG/Decl.5(XXXVI), paras 12-15.

¹⁵⁹ For a more detailed overview of these cases, see Francis N Ikome, 'Good Coups and Bad Coups: The Limits of the African Union's Injunction on Unconstitutional Changes of Power in Africa' (2007) Institute for Global Dialogue Occasional Paper No 55, 38-40 <http://igd.org.za/downloads/Occasional%20Papers/igd_occasional_paper_55.pdf> accessed 31 August 2016.

¹⁶⁰ For empirical data, see Issaka K Souare, 'The African Union as a Norm Entrepreneur on Military Coups d'état in Africa (1952-2012): An Empirical Assessment' (2014) 52 J Mod Afr Stud 69, 84-85.

an acceptance of democracy as a legal norm, albeit more through violation than adherence.

Consolidation of a system of collective defence against unconstitutional changes of governance in Africa occurred with the adoption of the 2000 Constitutive Act of the African Union.¹⁶¹ This important instrument gives the status of an enforceable law to previously soft law undertakings. Its article 14(p) defines ‘condemnation and rejection of unconstitutional changes of governments’ as one of the principles of the AU. Moreover, the Act envisages the suspension of the membership rights to states whose governments ‘shall come to power through unconstitutional means’.¹⁶² Additionally, in order to effectively deal with conflict and crisis situations, the AU set up the Peace and Security Council (PSC) as its standing organ,¹⁶³ whose functions resemble those of the UNSC. It became a mechanism through which the AU reacts to unconstitutional events that are prohibited by the Constitutive Act. Article 7(1)(g) of the PSC Protocol bestows the PSC with the power to ‘institute sanctions whenever an unconstitutional change of Government takes place in a Member State, as provided for in the Lomé Declaration’.¹⁶⁴ Its decisions are legally binding. Further, under article 4(h) of the Constitutive Act, the AU has the right to intervene in a Member State in respect of ‘grave circumstances’, such as war crimes, genocide and crimes against humanity.¹⁶⁵ It is clear that not every *coup d’état* results in such violations. However, the 2003 Amendment Protocol, which expands the AU’s authority to employ force in AU member states, inserts a new ‘grave circumstance’ triggering the right of the AU to intervene, namely ‘a serious threat to legitimate order’.¹⁶⁶ Albeit the Protocol does not elaborate what a serious threat to legitimate order might be, the unconstitutional change of government by virtue of endangering regional peace and stability and yet falling short of the three earlier mentioned crimes might well be characterised as such.

The AU’s democratic defence mechanism was put in action in Togo in 2005, when following the military overthrow of the President Gnassingbe

¹⁶¹ Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3.

¹⁶² *ibid* art 30.

¹⁶³ Protocol Relating to the Establishment of the Peace and Security Council of the African Union (adopted 9 July 2002, entered into force 26 December 2003) reprinted in (2005) 13 Afr J Int’l & Comp L 96. See also Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3, art 20(bis) (As inserted by article 9 of the Protocol on Amendments to the Constitutive Act of 11 July 2003). The PSC was formally launched on 25 March 2004 and effectively ended the peace and security responsibilities of the Central Organ of the AU, including responsibilities under the Lomé Declaration.

¹⁶⁴ Protocol Relating to the Establishment of the Peace and Security Council of the African Union (adopted 9 July 2002, entered into force 26 December 2003) reprinted in (2005) 13 Afr J Int’l & Comp L 96, art 7(1)(g).

¹⁶⁵ Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3, art 4(h).

¹⁶⁶ Protocol on Amendments to the Constitutive Act of the African Union (adopted 11 July 2003, entered into force 25 July 2006) art 4(h) <<http://www.refworld.org/docid/493fe67d2.html>> accessed 15 July 2016.

Eyadema, the AU mandated ECOWAS to ‘take all such measures as it deem[ed] necessary to restore constitutional legality in Togo within the shortest time’.¹⁶⁷ This was essentially an authorisation to use military force to reinstate the legitimate government akin to the 1997 Sierra Leone case. By the same token, the AU opposed coups in Mauritania (2005 and 2008), Guinea (2008), Guinea-Bissau (2009 and 2012), Madagascar (2009) and Niger (2010) by calling on putschists either to immediately relinquish power or to hold elections within six months.¹⁶⁸ The AU either imposed sanctions in the form of travel bans and visa restrictions or suspended the countries from the participation in the policy organs of the Organisation (Niger, Guinea-Bissau 2012) or both (Mauritania, Guinea and Madagascar).

The African Charter on Democracy, Elections and Governance of 2007,¹⁶⁹ which gave treaty effect to the 2000 Lomé Declaration as well as expanded some of its provisions, is even more explicit in its intolerance of military politics. Its article 2(4) states that one of its objectives is to ‘[p]rohibit, reject and condemn unconstitutional change of government in any member State as a serious threat to stability, peace, security and development’.¹⁷⁰ Moreover, article 14(2) of the Charter provides that ‘State Parties shall take legislative and regulatory measures to ensure that those who attempt to remove an elected government through unconstitutional means are dealt with in accordance with the law’.¹⁷¹ Article 23 of the Charter enlists circumstances that constitute an unconstitutional change of government. These are:

1. Any putsch or *coup d’Etat* against a democratically elected government.
2. Any intervention by mercenaries to replace a democratically elected government.
3. Any replacement of a democratically elected government by armed dissidents or rebels.
4. Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; or
5. Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.¹⁷²

The first four cases of unconstitutional changes of government are also envisaged under the Lomé Declaration, whereas the fifth case is an innovation of the African Democracy Charter. The first three forms of unconstitutional change are pro-incumbent provisions, which protect sitting governments from being ousted by rebel and dissident groups. Conversely, the remaining two

¹⁶⁷ AU PSC, ‘Communique of the 25th Meeting of the PSC’ (Addis Ababa, 25 February 2005) PSC/PR/Comm.(XXV), para 5.

¹⁶⁸ For a detailed overview of each case, see Eli Yemisi Omorogbe, ‘A Club of Incumbents? The African Union and *Coups d’État*’ (2011) 44 Vand J Transnat’l L 123, 138ff.

¹⁶⁹ African Charter on Democracy, Elections and Governance (adopted 30 January 2007, entered into force 15 February 2012) AU Doc Assembly/AU/Dec.147(VIII).

¹⁷⁰ *ibid* art 2(4).

¹⁷¹ *ibid* art 14(2).

¹⁷² *ibid* art 23.

cases, namely failure to concede power to winning parties (art 23(4)) and tenure prolongation (art 23(5)), can be considered to be more democracy-oriented as they attempt to tie the hands of incumbents.

On top of that, the 2007 Charter gives the PSC the power to act in situations that may affect ‘democratic political institutional arrangements or the legitimate exercise of power’ of the member state.¹⁷³ Even though the exact content of this provision is somewhat unclear, it appears to vest into the AU the power to militarily intervene when the democratic order of the member state is endangered by unconstitutional usurpation. Finally, the Charter envisages a set of sanctions against the government that acceded to power by unconstitutional means, which include suspension of the government concerned from participation in the organs of the AU, prohibition of perpetrators of unconstitutional change from participating in elections or from holding any political office, the trial of the perpetrators before the competent court of the Union and imposition of other punitive measures.¹⁷⁴ Indeed, the provisions of the 2007 Charter on unconstitutional change are so extensive in comparison with the previous instruments that one can confidently claim that the illegitimate usurpation of power in Africa is now to be considered a ‘crime against democracy’.¹⁷⁵

Subsequent to the adoption of the African Democracy Charter, the responses of the AU to unconstitutional takeovers have not been uniform. On the one hand, in Cote d’Ivoire, the AU supported the ouster of Gbagbo who lost democratic elections to Ouattara in 2010 but refused to hand over power. In response to the crisis, the AU suspended ‘the participation of Cote d’Ivoire in all AU activities until such a time the democratically-elected President assumes state power’¹⁷⁶ and welcomed the deployment of the UN and French forces to secure the safe accession to office of President Ouattara.¹⁷⁷ On the other hand, when the ‘Arab Spring’ was sweeping across Egypt and led to the demise of the Mubarak’s regime by means of *coup d’état*, which was staged in response to popular uprisings, the PSC, instead of condemning the unconstitutional revolt in line with its previous practice, issued a communique expressing support to the ‘legitimate aspirations of the Egyptian people for democracy’.¹⁷⁸ Such peculiar reaction of the AU to the Arab Spring unconstitutional changes of government had already been documented with respect to Tunisia, where following the revolutionary overthrow of President Ben Ali, the PSC ‘expressed its solidarity with the people of Tunisia’ and

¹⁷³ African Charter on Democracy, Elections and Governance (adopted 30 January 2007, entered into force 15 February 2012) AU Doc Assembly/AU/Dec.147(VIII), art 24.

¹⁷⁴ *ibid* art 25.

¹⁷⁵ Eli Yemisi Omorogbe, ‘A Club of Incumbents? The African Union and *Coups d’État*’ (2011) 44 *Vand J Transnat’l L* 123, 136.

¹⁷⁶ AU PSC, ‘Communique of the 252nd Meeting of the Peace and Security Council of the African Union’ (Addis Ababa, 9 December 2010) PSC/PR/COMM.1 (CCLII), para 4.

¹⁷⁷ AU PSC, ‘Communique of the 259th Meeting of the Peace and Security Council’ (Addis Ababa, 28 January 2011) PSC/AHG/COMM(CCLIX).

¹⁷⁸ AU PSC, ‘Communique of the 260th Meeting of the Peace and Security Council’ (Addis Ababa, 16 February 2011) PSC/PR/COMM.(CCLX), para 8.

‘strongly condemned the excessive use of force against the demonstrators’.¹⁷⁹ Likewise, in Libya in 2011, the Union not only failed to condemn and reject the anticonstitutional putsch of the Gaddafi’s regime but also underscored that ‘the aspirations of the people of Libya for democracy, political reform, justice and socio-economic development are legitimate’¹⁸⁰ and expressed its support to the former rebels who had formed the National Transitional Council of Libya, which eventually became the new Libyan government.¹⁸¹ Albeit an argument can be made that the AU is beginning to refine its policy towards unconstitutional changes of government, which do not now cover the cases of the dethronement of autocratic leaders, the actual justifications for such manifest violations of the Charter and the AU Constitutive Act arguably related to the superior status of the UNSC Resolutions (e.g., Res 1970 and 1973) with respect to the AU instruments.¹⁸² It remains to be seen whether the AU’s PSC will clarify why and under what circumstances a civilian-led uprising against an undemocratic state leader should not be designated as an unconstitutional change of government.

As the foregoing analysis demonstrates, African legal framework as well as practice exhibits a strongly negative attitude towards democratic disruptions. However, it is not unproblematic. As Petersen noted, it is both over- and under-inclusive. On the one hand, military coups have been condemned irrespective of the legitimacy of toppled regimes. On the other hand, the AU has been reluctant to act with respect to other unconstitutional events, such as electoral rigging and constitutional amendments to entrench one’s power.¹⁸³ This is arguably to say that the AU’s responses to unconstitutional changes of government were in defence of incumbent governments rather than democracy *per se*. Yet, African legal instruments and declarations are more refined than the AU’s actions. In contrast to the blanket policy of the AU with regard to all coups in practice, the relevant legal provisions reveal that *coups d’état* or armed rebellions ousting unelected

¹⁷⁹ AU PSC, ‘Press Statement of the 257th Meeting of the Peace and Security Council of the African Union’ (Addis Ababa, 15 January 2011) PSC/PR/COMM.2(CCLVII).

¹⁸⁰ AU PSC, ‘Communique of the 261 Meeting of the Peace and Security Council of the African Union’ (Addis Ababa, 23 February 2011) PSC/PR/COMM(CCLXI), para 5.

¹⁸¹ AU PSC, ‘Communique of the 275th Meeting of the Peace and Security Council of the African Union’ (Addis Ababa, 26 April 2011) PSC/MIN/COMM.2(CCLXXV).

¹⁸² African Union Commission of International Law, ‘Legal Opinion of the AU Commission of International Law (AUCIL) on certain aspects of the situation in Libya: Scope, Legal Implications and Obligations of Member States of the United Nations, including African Union States, Arising from Security Council Resolutions 1970 and 1973’ (Second Extraordinary Session, Addis Ababa, 12 May 2011) 2013 AUCIL YB 69, para 36.

¹⁸³ Niels Petersen, ‘The Principle of Democratic Teleology in International Law’ (2009) 34 *Brook J Int’l L* 33, 69-70. See also Djacoba Liva Tehindrazanarivelo, ‘Les sanctions de l’Union africaine contre les coups d’État et autres changements anticonstitutionnels de gouvernement: potentialités et mesures de renforcement’ (2004) 12 *Afr YBIL* 255, 280; Ademola Abass, ‘African Regional Organizations, the African Peace and Security Architecture and the Protection of Human Rights’ in Ademola Abass (ed), *Protecting Human Security in Africa* (OUP 2011) 280.

regimes are not technically unconstitutional changes of government¹⁸⁴ since only 'democratically elected governments' enjoy protection. Notwithstanding these criticisms, some scholars refute the claims for a more nuanced AU's policy towards unconstitutional changes of government. For them, any type of constitutional regime is better than unpredictable post-coup politics, since under constitutional regimes there are more ways through which political changes can be effectuated than under military regimes.¹⁸⁵ On a more theoretical level, the problem of the African collective system of defence against democratic disruptions is the AU's procedural understanding of democracy. With its emphasis on democracy of origin, the Organisation only reacts to coups that topple elected regimes and stands idle when elected leaders abuse their power (democracy of exercise).¹⁸⁶ However, considering the fact that the difference between electoral democracy and authoritarian regime is increasingly blurred given the latter's propensity to resort to some form of elections to legitimise its rule, the African external defensive mechanism remains for now largely ineffective.

Lastly, the practice of the AU with respect to democratic disruptions has been widely criticised for its ostensible incongruence with the collective security provisions of the UN Charter establishing the primacy of the SC in deciding on the issues of the use of force. By setting up its own 'mini-Security Council', the AU exceeded its authority that the Charter accords to regional organisations.¹⁸⁷ Because in practice such regional arrangements have not been challenged by states in any significant way, some scholars concluded that multilateral pro-democratic intervention is now an accepted norm, at least at the regional level.¹⁸⁸ For others, this simply reaffirms the undetermined status of pro-democratic intervention 'destined to remain awkwardly poised between condoned practice and accepted law'.¹⁸⁹

¹⁸⁴ See Kalkidan Obse, 'The Arab Spring and the Question of Legality of Democratic Revolution in Theory and Practice: A Perspective Based on the African Union Normative Framework' (2014) 27 LJIL 817, 832.

¹⁸⁵ Issaka K Souare, 'The African Union as a Norm Entrepreneur on Military Coups d'Etat in Africa (1952-2012): An Empirical Assessment' (2014) 52 J Mod Afr Stud 69, 83.

¹⁸⁶ The division between the legitimacy of origin and legitimacy of exercise was developed by Jean d'Aspremont, 'Legitimacy of Governments in the Age of Democracy' (2006) 38 NYUJ Int'l L & Pol 877.

¹⁸⁷ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 53(1) ('[N]o enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council'). See also David Wippman, 'Pro-Democratic Intervention' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 814.

¹⁸⁸ Jeremy Levitt, 'Pro-Democratic Intervention in Africa' (2006) 24 Wis Int'l LJ 785, 787-88.

¹⁸⁹ David Wippman, 'Pro-Democratic Intervention' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 814.

5.5. Asia: Between Statutory Conservatism and ‘Constructive Engagement’

Unlike the regional cooperation in Europe, the Americas and Africa aimed at fostering peace and development through political homogenisation (albeit with significant variations), the vast region of Asia is mostly marked by the need to secure the sovereignty of newly decolonized countries as a ‘hard won prize’¹⁹⁰ and to lessen the possibility of external intervention. Thus, it comes as no surprise that regional organisations in the Asian region have not adopted admission criteria based on human rights and democracy, nor have they committed themselves to suspend their members for reneging upon such standards. For instance, the founding document of the Association of Southeast Asian Nations (ASEAN) — an organisation entrusted with the task to foster closer cooperation between states in Southeast Asia — provides that ASEAN is ‘open for participation to all States in the South-East Asian Region’ subscribing to its ‘aims, principles and purposes’.¹⁹¹ Moreover, prospective members are also required to ratify the Treaty of Amity and Cooperation in Southeast Asia laying down certain fundamental principles, including ‘[m]utual respect for the independence, sovereignty, equality, territorial integrity’ and ‘[n]on-interference in the internal affairs of one another’.¹⁹² With a view of strengthening ASEAN’s legal status and codifying its institutional framework, the ASEAN Charter was adopted in 2007.¹⁹³ Concerning its provisions on membership, it merely provided that the new members must be willing to ‘carry out obligations of the membership’.¹⁹⁴ Similar policy of non-interference in the internal affairs of states is adopted by the League of Arab States — a regional organisation of Arab countries in and around North Africa aiming to secure closer relations and cooperation between them — whose constitutive document proclaims that ‘[e]very independent Arab State shall have the right to adhere to the League’.¹⁹⁵ It further states that ‘[e]very member State of the League shall respect the form of government obtaining in the other States of the League, and shall recognize the form of government obtaining as one of the rights of those States, and shall pledge itself not to take any action

¹⁹⁰ Georges Abi-Saab, ‘The Newly Independent States and the Rule of International Law: An Outline’ (1962) 8 *How LJ* 95, 103. See also Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004) 194-95.

¹⁹¹ Declaration Constituting an Agreement Establishing the Association of South East Asian Nations (ASEAN) (signed and entered into force 8 August 1967) 1331 UNTS 235 (Bangkok Declaration) art 4.

¹⁹² Treaty of Amity and Cooperation in Southeast Asia (24 February 1976) 1025 UNTS 317, arts 2(a), 2(c).

¹⁹³ Charter of the Association of Southeast Asian Nations (adopted 20 November 2007, entered into force 15 December 2008) 2624 UNTS 223 (ASEAN Charter).

¹⁹⁴ *ibid* art 6(2)(d).

¹⁹⁵ Pact of the League of Arab States (adopted 22 March 1945, entered into force 11 May 1945) 70 UNTS 237, art 1.

tending to change that form'.¹⁹⁶ Likewise, the (revised) Charter of the Organisation of Islamic Cooperation (OIC, formerly the Organisation of Islamic Conference), which safeguards and protects the interests of the Muslim world, holds that '[a]ny State, member of the United Nations, having Muslim majority and abiding by the Charter, which submits an application for membership may join the Organisation if approved by consensus only by the Council of Foreign Ministers on the basis of the agreed criteria adopted by the Council of Foreign Ministers'.¹⁹⁷

One exception is the Commonwealth of Nations, formerly known as the British Commonwealth – an intergovernmental organisation of 53 states that were mostly territories of the former British Empire, including Asian states. A commitment to democracy can be found in the 1971 Declaration of Commonwealth Principles (Singapore Declaration), which recognises participation 'by means of free and democratic political processes' as an 'inalienable right',¹⁹⁸ and is reiterated in the 1991 Harare Declaration.¹⁹⁹ The Harare principles were later on adopted as a criterion for determining future membership of the organisation.²⁰⁰ The formal democracy clause was included in the 1995 Millbrook Action Programme on the Harare Declaration, which provides that 'in the event of an unconstitutional overthrow of a democratically elected government,' the measures include, among others, 'suspension of participation at all Commonwealth meetings and of Commonwealth technical assistance' if no progress is made after a period of two years as well as a set of 'further bilateral and multilateral measures by all member states,' including 'suspension from the association'.²⁰¹ To put this plan into practice, the

¹⁹⁶ *ibid* art 8.

¹⁹⁷ Charter of the Organization of Islamic Cooperation (adopted 14 March 2008, entered into force 3 September 2009) <<http://www.oicun.org/2/24/20140324031549266.html>> accessed 27 June 2017, replacing the Charter of the Islamic Conference (adopted 4 March 1972, entered into force 28 February 1973) 914 UNTS 110.

¹⁹⁸ Commonwealth, Singapore Declaration of Commonwealth Principles (22 January 1971) para 6 <<http://thecommonwealth.org/sites/default/files/history-items/documents/Singapore%20Declaration.pdf>> accessed 23 September 2016.

¹⁹⁹ Commonwealth, the Harare Commonwealth Declaration (20 October 1991) para 4 <<http://thecommonwealth.org/sites/default/files/history-items/documents/Harare%20Commonwealth%20Declaration%201991.pdf>> accessed 23 September 2016 ('[W]e believe in the liberty of the individual under the law, in equal rights for all citizens regardless of gender, race, colour, creed or political belief, and in the individual's inalienable right to participate by means of free and democratic political processes in framing the society in which he or she lives').

²⁰⁰ CHOGM, 'Edinburgh Communiqué' (Edinburg, 24-27 October 1997) (1998) 87 The Round Table 91, 95, para 20 ('Heads of Government received and endorsed a report from the Intergovernmental Group on Criteria for Commonwealth Membership. They agreed that in order to become a member of the Commonwealth, an applicant country should, as a rule, have had a constitutional association with an existing Commonwealth member; that it should comply with Commonwealth values, principles and priorities as set out in the Harare Declaration; and that it should accept Commonwealth norms and conventions').

²⁰¹ CHOGM, 'Millbrook Commonwealth Action Programme on the Harare Declaration' (Millbrook, 12 November 1995) para 3 <<http://thecommonwealth.org/sites/default/files/history-items/documents/millbrook%20declaration.pdf>> accessed 23 September 2016.

Commonwealth established the Commonwealth Ministerial Action Group (CMAG) entrusted with the task of assessing states' compliance with democratic standards and recommending measures for collective action in case of democratic disruption.²⁰² The CMAG was empowered to deal not only with traditional coups but also with any serious or persistent violations of the Harare Declaration principles. Its menu of possible steps in response to democratic interruption is particularly detailed, comprising such measures as public expression of disapproval by the Commonwealth's Secretary-General; good offices; bilateral demarcates by member countries; appointment of special envoys when necessary; stipulation of up to two years as the time frame for restoration of democracy if elections cannot be held within six months; exclusion of the recalcitrant government from the ministerial level meetings; suspension of participation at all Commonwealth meetings if progress is not made after two years; and consideration of appropriate further multilateral and bilateral measures.²⁰³ One should not, however, be overtly enthusiastic about the existence of an explicit democratic clause in Asia since the Commonwealth encompasses only a small portion of Asian states and is a 'soft' organisation, which 'does not encroach on the sovereignty of its individual members. Nor does it require its members to seek to reach collective decisions or to take united action'.²⁰⁴

However, the failure to formally recognise democracy as an essential attribute of states in Asia and the Arab world does not tell the whole story of the impact of democracy in these regions. In Southeast Asia, the incremental democratisation within the region led ASEAN to adopt a 'more relaxed view of state sovereignty and the attendant norm of non-interference in the internal affairs of states'.²⁰⁵ In 1998, Thailand urged a change from 'non-intervention' to 'constructive intervention', or 'flexible engagement',²⁰⁶ acknowledging that:

[T]he dividing line between domestic affairs on the one hand and external or transnational issues on the other is less clear. Many 'domestic' affairs have obvious external or trans-national dimensions, adversely affecting neighbours, the region and the region's relations with others. In such cases, the affected countries should be able to express their opinions and concerns in an open, frank and constructive manner.²⁰⁷

²⁰² *ibid* part c.

²⁰³ *ibid* para 3.

²⁰⁴ 'The Agreed Memorandum on the Commonwealth Secretariat' (1989) 78 *The Round Table* 467, para 4.

²⁰⁵ Amitav Acharya, 'Democratization and the Prospects for Participatory Regionalism in Southeast Asia' in Kanishka Jayasuriya (ed), *Asian Regional Governance — Crisis and Change* (Routledge 2004) 134.

²⁰⁶ Robert Tasker and Murray Hiebert, 'Dysfunctional Family' (1998) 161 *Far East Econ Rev* 20.

²⁰⁷ Foreign Minister Surin, cited in Carlyle A Thayer, 'ASEAN: from Constructive Engagement to Flexible Intervention' (1999) 3 *Harv Asian-Pac Rev* 67, 70.

This has been supported by Philippines and Indonesia, the latter claiming that the ASEAN doctrine of non-interference 'is no longer a principle which cannot be openly discussed'.²⁰⁸ Moreover, the 2007 ASEAN Charter for the first time explicitly refers to the strengthening of democracy, good governance and the rule of law as the Organisation's purposes.²⁰⁹

The first instance of the ASEAN 'constructive engagement' with issues of internal regime of a state is the case of Burma/Myanmar.²¹⁰ Whilst Myanmar was admitted to ASEAN irrespective of the authoritarian character of its government (military dictatorship) and poor human rights record, it was denied the opportunity to chair the Organisation (a position that rotates alphabetically among the member states) until democratic reforms had been implemented.²¹¹ In 2005, ASEAN urged Myanmar to foster its 'Roadmap to Democracy' and to release detainees.²¹² More robust initiatives include the suggestion to suspend Myanmar's membership in ASEAN in the case there was no progress by December 2006.²¹³ Although this suggestion has never materialised, it is hard to overlook the sea change in the political climate of Southeast Asia, where the so long cherished principle of non-intervention is becoming increasingly circumscribed by the commitments to democracy and human rights.

Another instance of ASEAN growing readiness to meddle into the internal affairs of its future members is that of Cambodia. After the First Prime Minister Prince Ranariddh was ousted by the Second Prime Minister Hun Sen in 1997 due to the failure to reach an agreement on certain political issues, including the status of former Khmer Rouge soldiers, the reaction of the state members of ASEAN was largely negative. Considering the fact that Cambodia was at that time at the process of admission to the Organisation, Thailand, for instance, claimed that a state's internal policies were 'an important factor to consider'.²¹⁴ Cambodian admission was eventually delayed until order was

²⁰⁸ Amitav Acharya, 'Democratization and the Prospects for Participatory Regionalism in Southeast Asia' in Kanishka Jayasuriya (ed), *Asian Regional Governance — Crisis and Change* (Routledge 2004) 134-35.

²⁰⁹ Charter of the Association of Southeast Asian Nations (adopted 20 November 2007, entered into force 15 December 2008) 2624 UNTS 223 (ASEAN Charter) arts 1(7), 2(2)(h)-(i).

²¹⁰ Burma was renamed as Myanmar by the military regime in 1989 with the adoption of the Adaptation of Expression Law (1989).

²¹¹ Connie Levett, 'Threat to Tip Burma from ASEAN Role' *Sydney Morning Herald* (Bangkok, 28 March 2005) <<http://www.smh.com.au/news/World/Threat-to-tip-Burma-from-ASEAN-role/2005/03/27/1111862258493.html?from=moreStories>> accessed 21 September 2016.

²¹² Chairman's Statement of the 11th ASEAN Summit 'One Vision, One Identity, One Community' (Kuala Lumpur, 12 December 2005) para 34 <http://asean.org/?static_post=chairman-s-statement-of-the-11th-asean-summit-one-vision-one-identity-one-community-kuala-lumpur-12-december-2005> accessed 21 September 2016.

²¹³ 'Statement of the ASEAN Inter-Parliamentary Myanmar Caucus (AIPMC) on Good Governance, Democracy and ASEAN' (Kuala Lumpur, 2-3 December 2005) <<http://www.burmanet.org/news/2005/12/05/asean-inter-parliamentary-myanmar-caucus-conference-on-good-governance-democracy-and-asean/>> accessed 21 September 2016.

²¹⁴ Foreign Minister Prachuab Chaiyasan, cited in Ian Stewart, 'Conflicting Signals Remain over Burma's Admission' *South China Morning Post* (Hong Kong, 31 May 1997)

restored and elections were held. In his comments to such an unprecedented move in the ASEAN history, Singapore's Foreign Minister Jayakumar stated that '[a]ny unconstitutional change of government is cause for concern. Where force is used for an unconstitutional purpose, it is behaviour that ASEAN cannot ignore or condone'.²¹⁵ The similar view was expressed by Malaysia's Foreign Minister Abdullah pointing out that '[i]f an election can be carried out — a peaceful and free election conducted in adherence to the UN-brokered Paris Peace Accord — a government chosen by its people will see the admission of Cambodia into ASEAN'.²¹⁶ It remains to be seen whether ASEAN will broaden its policy of constructive engagement by, inter alia, sanctioning states experiencing anti-constitutional overthrows, particularly considering the fact that the 2007 ASEAN Charter omits any reference to expulsion or suspension from the Organisation. However, article 20(4) of the Charter entrusts the ASEAN Summit with the power to make a decision 'in the case of a serious breach of the Charter or non-compliance'.²¹⁷ This article could serve as a potential legal ground for such actions. For now, however, soft diplomacy, informality, discussion and organisation minimalism are preferred to coercive politics of suspension and/or expulsion, which is commonly dubbed as the 'ASEAN way'.²¹⁸ Moreover, the democratisation process in Southeast Asia remains incomplete and uneven considering that several states, such as Burma and Vietnam, remain firmly under authoritarian rule.

Another example of a shift from the 'Non-Western Way' to a more robust engagement occurred in the Pacific Islands Forum (formerly the South Pacific Forum) established in 1971. Initially created as an informal group of seven Pacific nations — Nauru, Western Samoa, Tonga, Fiji, the Cook Islands, Australia and New Zealand — aimed at solving issues of common concern, the Forum has experienced a stable increase in size and formality.²¹⁹ In 2000, the

<<http://www.burmalibrary.org/reg.burma/archives/199705/msg00613.html>> accessed 21 September 2016.

²¹⁵ Cited in Brendan Pereira, 'ASEAN Can't Condone Use of Force: Jaya' *Straits Times* (Singapore, 25 July 1997) 29
<<http://eresources.nlb.gov.sg/newspapers/Digitised/Page/straitstimes19970725-1.1.29.aspx>> accessed 21 September 2016.

²¹⁶ Cited in Fauziah Ismail, 'Cambodia May Join ASEAN after Polls: Abdullah' *Business Times* (Malaysia, 26 September 1997) 1.

²¹⁷ Charter of the Association of Southeast Asian Nations (adopted 20 November 2007, entered into force 15 December 2008) 2624 UNTS 223 (ASEAN Charter) art 20(4).

²¹⁸ For a deeper discussion on the 'ASEAN Way', see Koh Keng-Liam and Nicolas A Robinson, 'Inter-Governmental Governance: Lessons from the "ASEAN Way"' (2002) 6 *Sing YBIL* 640, 642-43; Paul J Davidson, 'The ASEAN Way and the Role of Law in ASEAN Economic Cooperation' (2004) 8 *Sing YBIL* 165; Alison Duxbury, *The Participation of States in International Organizations: The Role of Human Rights and Democracy* (CUP 2011) 199; Logan Masilamani and Jimmy Peterson, 'The "ASEAN Way": The Structural Underpinnings of Constructive Engagement' (2014) *FPJ* 1.

²¹⁹ Currently it has eighteen member states, which include Australia, Cook Islands, Federated States of Micronesia, Fiji, French Polynesia, Kiribati, Nauru, New Caledonia, New Zealand, Niue, Palau, Papua New Guinea, Republic of Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. Pacific Islands Forum Secretariat
<<http://www.forumsec.org/pages.cfm/about-us/>> accessed 6 March 2018.

Biketawa Declaration was adopted.²²⁰ It includes a set of principles and courses of action aimed to guide the Forum leaders on matters of their national politics, including good governance, equal rights, democracy and sustainable development.²²¹ Moreover, the Declaration envisages a mechanism of response in time of crisis, which can be characterised by, among others, lack of good governance, that includes the creation of a Ministerial Action Group, third party mediation, convening of a special high level meeting of the Forum Security Committee or an ad hoc meeting of Forum Ministers and other necessary targeted measures.²²² The Biketawa Declaration has been recognised by many as a significant step forward in terms of promotion of democracy, ‘a quantum leap forward’.²²³ As Rolfe rightly observed, the Declaration signifies that ‘[t]he Pacific Way is potentially heading away from its roots towards the Western way’.²²⁴

The Western way tendency was further affirmed in 2009 when Fiji was suspended from meetings of the Forum in response to its military regime’s failure to put the country back on the democratic track within the acceptable timespan.²²⁵ The Forum was concerned with constitutional issues as well as human rights violations in Fiji²²⁶ and urged the Fijian interim Government to respect its commitment to hold elections ‘in the shortest practicable time’.²²⁷ In 2009 at a special leaders’ retreat in Port Moresby, the Forum leaders called for the restoration of democracy in Fiji ‘without further delay’ and agreed on a set of ‘targeted measures’, including ‘suspension of participation by the Leader, Ministers and officials of the Fiji Interim Government in all Forum meetings and events’, which would take effect unless ‘the Fiji Interim

²²⁰ Thirty-First Pacific Islands Forum, ‘Forum Communique 2000’ (Tarawa, 27-30 October 2000) attachment 1 (Biketawa Declaration) <<http://www.forumsec.org/resources/uploads/attachments/documents/Biketawa%20Declaration,%2028%20October%2020002.pdf>> accessed 21 September 2016.

²²¹ *ibid* para 1.

²²² *ibid* para 2.

²²³ The phrase was used by Australian Prime Minister, cited in Steward Firth, ‘A Reflection on South Pacific Regional Security, Mid-2000 to Mid-2001’ (2001) 36 *J Pac Hist* 277, 279.

²²⁴ Jim Rolfe, ‘The Pacific Way: Where “Non-Traditional” Is the Norm’ (2000) 5 *Int’l Neg* 427, 434.

²²⁵ For a more detailed overview of the 2006-09 Fiji’s political crisis, see Nina Markovic, ‘A Timeline of the 2009 Political Crisis in Fiji and Key Regional Reactions’ Parliament of Australia Background Note 10/2009 (20 August 2009) <<https://www.aph.gov.au/binaries/library/pubs/bn/fads/fiji.pdf>> accessed 23 September 2016.

²²⁶ See Forum Secretariat, ‘Pacific Islands Forum — Fiji Joint Working Group on the Situation in Fiji, Terms of Reference’ (13 April 2007) <http://www.forumsec.org/resources/uploads/embeds/file/tor_for_the_pif-fiji_joint_working_group_on_the_situation_in_fiji.pdf> accessed 22 September 2016; ‘Pacific Islands Forum — Fiji Joint Working Group on the Situation in Fiji’ Press Statement (19 June 2008).

²²⁷ Forum Secretariat, ‘Pacific Islands Forum — Fiji Joint Working Group on the Situation in Fiji, Terms of Reference’ (13 April 2007) <http://www.forumsec.org/resources/uploads/embeds/file/tor_for_the_pif-fiji_joint_working_group_on_the_situation_in_fiji.pdf> accessed 22 September 2016.

Government nominates an election date by 1 May 2009'.²²⁸ Following the failure of Fiji to comply, the suspension was announced by the Chair of the Forum Toke Talagi on 2 May 2009: 'It is with considerable sorrow and disappointment that I confirm the suspension of the current military regime in the Republic of the Fiji Islands, from full participation in the Pacific Islands Forum, with immediate effect from 2 May 2009'.²²⁹ Talagi further maintained that '[a] regime which displays such a total disregard for basic human rights, democracy and freedom has no place in the Pacific Islands Forum'.²³⁰ This was the first time in the Forum's history that a member state was suspended for its non-democratic politics. The decision of the Pacific Islands Forum was supported by the Melanesian Spearhead Group — a sub-regional organisation formed with focus to promote economic growth among Melanesian countries — which encouraged Fiji to comply with the timetable for elections.²³¹

Distaste to military regimes has also been shown by the Commonwealth, whose commitment to defend democracy is clearly revealed by its decision to suspend several states from its membership on the basis of their failure to adhere to democratic standards. In 1995, Nigeria was suspended from membership 'in response to [...] a serious violation of the principles of the Harare Declaration'.²³² On a closer reading of the communique it stands clear that the decision to suspend was motivated by the military coup. After the restoration of a civilian rule, Nigeria regained its membership status. Since the action against Nigeria, Pakistan was suspended in 1999 after a military coup. In its Durban Communique, the Commonwealth declared that 'no legitimacy shall be accorded to the military regime'.²³³ It was suspended again in 2007 in

²²⁸ Pacific Islands Forum Special Leaders' Retreat, 'Leaders' Decision' (Port Moresby, 27 January 2009) paras 3(d), 3(h) and 3(i) <<http://www.piango.org/News/Member/2009/Forum%20Leaders%20Special%20Retreat%20Communique%20in%20Fiji.pdf>> accessed 23 September 2016.

²²⁹ Pacific Islands Forum Secretariat, 'Statement by Forum Chair on suspension of the Fiji military regime from the Pacific Islands Forum' Press Statement 21/09 (2 May 2009) <<http://www.forumsec.org/pages.cfm/newsroom/press-statements/2013/2009/forum-chair-on-suspension-of-fiji-military-regime-from-pif.html?printerfriendly=true>> accessed 23 September 2016.

²³⁰ *ibid.* See also 'Fiji Formally Ousted from Pacific Islands Forum' *Stuff* (2 May 2009) <<http://www.stuff.co.nz/world/south-pacific/2380019/Fiji-formally-ousted-from-Pacific-Islands-Forum>> accessed 28 February 2017.

²³¹ 'Melanesian Spearhead Group to Help Fiji Hold Elections Next Year' *Radio New Zealand International* (28 May 2008) <<http://www.radionz.co.nz/international/pacific-news/177413/melanesian-spearhead-group-to-help-fiji-hold-elections-next-year>> accessed 23 September 2016.

²³² CHOGM, 'Auckland Communique' (Auckland, 1-10 November 1995) para 10 <http://www.keepeek.com/Digital-Asset-Management/oecd/commonwealth/development/the-auckland-communique-november-1995/the-auckland-communiqu_9781848595583-2-en#.V-UY-DJDXbU> accessed 23 September 2016.

²³³ CHOGM, 'Durban Commonwealth Communique' (Durban, 12-15 November 1999) para 18 <<http://www.dirco.gov.za/foreign/Multilateral/inter/durban2001.htm>> accessed 23 September 2016.

response to the imposed state of emergency²³⁴ but reinstated in 2008 following parliamentary elections and the new President's commitment to stand down as Chief of any Staff.²³⁵ Fiji was suspended from the councils of the Commonwealth twice, in 1987 and 2000, and in 2009 it was fully suspended from the organisation following military coups that overthrew elected governments. In the context of the 2009 political crisis, the Commonwealth proclaimed that Fiji was in violation of the Commonwealth values and principles and should satisfactory progress not be made by Fiji towards reinstatement of democracy 'Fiji Islands will be fully suspended from the Commonwealth at the Group's next meeting [on 26] September 2009'.²³⁶ On 1 September 2009, Fiji was fully suspended from the organisation.²³⁷

To conclude, whilst Asia's stance toward democracy promotion, including defence of democratic institutions, has shifted dramatically towards Western style, it varies considerably across the Asian region and it remains largely ad hoc and confined to quiet diplomacy, informal consultation and consensus.

5.6. Conclusion

This chapter has shown that states are increasingly willing to monitor each other's domestic politics by enlarging the corpus of international law with the norms explicitly prohibiting democratic disruptions and acting accordingly. Whilst at the global level such practice of reacting to democratic threats is predominantly confined to the situations representing a threat to international peace and security and remains patchy at best, at regional levels, namely in Europe, the Americas and Africa, democracy is now a legal norm, and any unconstitutional interruption of democracy creates an abnormal situation that must be corrected, even though the practice remains inconsistent, contradictory and heavily dependent on short-term political objectives of states. Moreover, depending on regional peculiarities, the scope and robustness of the external system of defence of democracy varies, beginning with the soft model of 'intervention without intervening' in the Americas and culminating in the

²³⁴ CMAG, 'Concluding Statement', Eve-of-CHOGM Meeting on the Harare Declaration (Kampala, 22 November 2007) para 9 <<http://allafrica.com/stories/200711230573.html>> accessed 23 September 2016.

²³⁵ CMAG, 'Concluding Statement', 29th Meeting on the Harare Declaration (London, 12 May 2008) paras 5, 8 <<http://www.archive-org-2012.com/open-archive/485568/2012-10-20/c2f0da767b305c22e7b363c5f1f8ebb7>> accessed 23 September 2016.

²³⁶ 'Commonwealth Issues Strong Statement on Fiji after Ministerial Meeting' *The Telegraph* (London, 3 March 2009) <<http://www.telegraph.co.uk/news/wikileaks-files/london-wikileaks/8305179/COMMONWEALTH-ISSUES-STRONG-STATEMENT-ON-FIJI-AFTER-MINISTERIAL-MEETING.html>> accessed 23 September 2016.

²³⁷ Commonwealth Secretariat, 'Fiji Suspended from the Commonwealth' Press Release (1 September 2009) <<http://www.commonwealthofnations.org/commonwealth/commonwealth-membership/withdrawals-and-suspension/>> accessed 23 September 2016.

stringent African mechanism envisaging outright military intervention to restore democracy as the last resort. In both regions, the definition of threats to democracy is rather narrow as it is restricted to military and executive coups and is reactive in nature. The European system of collective action in defence of democracy lies somewhere in between, encompassing the widest *assortiment* of responses to even minor cases of democratic backsliding and emphasising the preventive dimension of defence against undemocratic transgressions. Considering the long-standing democratic tradition within Europe and consequently more sophisticated and specific requirements towards states with respect to their national politics, it comes as no surprise that the European tripartite system of reaction to democratic threats is so far the most efficient. Lastly, the Asian model of 'flexible engagement' is the weakest in terms of legalisation, institutionalisation and enforcement. Bearing in mind the exceptional panoply of variations within the vast region of Asia stretching from ASEAN's preferred policy of informal diplomacy and respect for the principle of non-intervention to the Commonwealth's more sustained pattern of sanctioning antidemocratic usurpers, the Asian regional system of collective defence of democracy is close to non-existent as the concept is understood in other regions.

These considerable variations notwithstanding, the preceding comprehensive overview of democracy clauses in the charters of international and regional organisations and other multilateral instruments reveals that they contain a number of common features. They typically include a set of shared general democratic principles, set up a mechanism of collective action in response to democratic disruption and specify a procedure for collective response with an array of possible outcomes. Such homogenisation of, and convergence between, the international system of external defence of democracy and regional mechanisms of collective action in response to democratic disruptions speak for the gradual institutionalisation of the enforcement mechanism of the right to democracy. Indeed, if states are now not only abstractly required to introduce and maintain democracy but also forced to do so through a plethora of international and regional collective arrangements, how can one effectively argue that democracy is at best a political principle not susceptible to legal delineation?

6. Internal Defence of Democracy: The Right to Revolution

Unless in certain conditions we have the right to rebel, much talk of human rights can be dismissed as empty rhetoric.¹

Having previously ascertained that the doctrine of global constitutionalism represents not only an academic artefact but also the actual process of transformation of international relations where the right to democracy is an inherent element, it is fair to claim that certain normative claims in defence of constitutional integrity of international law are not only permissible but also indispensable. In fact, it has long been accepted in jurisprudence and legal theory that the descriptive cannot be estranged from the normative and the two often inform and reinforce each other.² Distinct from positive law, the legitimacy of such normative claims is derived from their inherent moral value for the international community at large. The right to revolution is one such claim. However, to say that revolution lacks conventional basis in law is not to say that it is a purely natural norm, standard of justice or any other form of 'oughtness'. It is rather to accept that the role which revolution plays in the international legal system resembles that of dark matter in the universe: it does not directly interact with any norm of international law and, yet, its presence is constantly felt. It shapes and directs international legal dynamics and constructs international legal conscience. International law is reliant on revolution because the latter is a type of anarchy against which the law affirmed itself. On the other hand, the potential destructive power of revolution represents a direct threat to the law's existence and integrity, which hinders legal commentators from invoking the concept on the level of first-order legal norms. The progressive development of international human rights law, which emerged from the ruins of the Second World War, brings in new dynamics into this conundrum. It adds both moral legitimacy and extra-legal material for normative claims, for whom traditional state-to-state international law was too hostile an environment to establish themselves. It means that the notion of revolution as a right is not purely an academic invention bolstered by the considerations of morality and justice but has a decent legal basis in modern international law, to be examined in the following sections.

The democratic entitlement thesis implies a particular role for revolution, namely that of the ultimate remedy against democratic disruption. The Latin legal maxim *ubi ius, ubi remedium* (where there is a right, there must be a

¹ Tony Honore, 'Right to Rebel' (1988) 8 Oxford J Leg Stud 34, 34.

² Stephen R Perry, 'Hart's Methodological Positivism' (1998) 4 Legal Theory 427, 438, 466; Jean d'Aspremont, 'International Legal Constitutionalism, Legal Forms and the Need for Villains' in Anthony F Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar Publishing 2017) 161.

remedy) means that human rights should be secured by remedies. As Tony Honore astutely noted, in order to maintain a tight distinction between rights and aspirations, two interrelated elements are crucial: recognition and *remedy*.³ Indeed, what is the rationale behind possessing a human right if there are no means to vindicate it when it is violated? If rights did not imply remedies then the right holder would be a mere critic: he would solely condemn the violation of his interests without employing the language of legal obligation.⁴ Rights without remedies are empty, naked and illusory. The preceding chapters have demonstrated that there is a right to democracy in international law. If democracy is a human right applicable to anyone on Earth what happens if it is violated? What right holders can do if they have never experienced this right by virtue of living in an authoritarian state?

Whilst the right to revolution as an ultimate remedy in defence of democracy is more easily justified against a tyrannical state, this is less so with respect to democratic governments. Classical democratic theory maintains that *pouvoir constituant* is expressed through elections as the *only* way to determine public values and goals.⁵ The existence of liberal democratic institutions, such as the rule of law and independent judiciary, and a set of constitutionally guaranteed human rights protecting the freedom of expression and peaceful protest is said to render any form of non-state political violence redundant and, thus, unjustified.⁶ Moreover, because revolutions are always unconstitutional in that they involve the overthrowing of the existing regime through a violation of the established constitution, there is a fundamental incompatibility between a democratic constitutional order and revolutionary change. One can, nonetheless, imagine a situation when even in a true democracy the government has become oppressive over the course of its mandate and it is too long to wait for new elections to replace it. It is, thus, fair to ask whether any remedy exists against such transgressions of legitimate authority. Because ‘the essence of justice is resistance against injustice’⁷ to completely dispense with the right to resist against unjust government is to undermine the very value of democracy. Thus, the right to resist is recognised in classical democratic theory but it is rather a ‘small scale right to resist’,⁸ which entails recourse to law, peaceful protest, the exercise of civil and political rights, passive resistance and (non-violent) civil disobedience. This ‘petty’ resistance must be

³ Tony Honore, ‘Right to Rebel’ (1988) 8 Oxford J Leg Stud 34, 35.

⁴ *ibid.*

⁵ True, referenda, public protests and active engagement in the activities of civil society organisations play an important role in shaping public debate. Yet, they do not substitute elections as the main means to participate in political decision-making. Moreover, the peaceful character of such forms of political activism is crucial for their legitimacy and legality.

⁶ But see David Miller, ‘The Use and Abuse of Political Violence’ (1984) 32 Pol Stud 401, 409 ([V]iolence is sometimes a uniquely effective way of achieving political objective, even within the framework of liberal democracy’).

⁷ Arthur Kaufmann, ‘A Small Scale Right to Resist’ (1986) 21 New Eng L Rev 571, 571.

⁸ *ibid.* See also Illan Rua Wall, ‘The Defense of Conscience: A Limited Right to Resist’ (2004) 5 Hibernian LJ 275.

continuously invoked to render ‘grand’ resistance, or revolution, superfluous.⁹ In addition, under the classical doctrine, revolution is never acceptable because it never arrives at the right time: it is either too early or too late. As Kaufmann explains, the right to revolution cannot occur if ‘the public authority stayed within the form and boundaries of law or as long as the at least elementary principles of the rule of law and constitution had not been abandoned, that extreme situation to which the right to resist should be restricted was not present; law and order had priority over the fighting of injustice which might have been connected with outbreaks of violence’.¹⁰ He insists, however, that if ‘the last remnants of the rule of law and constitution had been eliminated and despotism firmly established, resistance was useless because it seems hopeless [...] because the legitimacy of resistance requires potential success’.¹¹

Contemporary (European) democratic theory invented the concept of ‘militant’ or ‘intolerant’ democracy (*stereitbare Demokratie*) to avert democratic dismantlement by anti-democratic forces. Militant democracy is a specific sub-type of liberal democracy which was developed in post-war (West) Germany by the Federal Constitutional Court of Germany¹² to prevent the descendants of the Nazi and Communist parties from gaining power within the democratic order.¹³ Whilst German case represents the most paradigmatic and far-reaching endorsement of this doctrine, the instruments of militant democracy can also be found in most post-war European constitutions and ordinary laws, such as, for example, the 1958 French Constitution (art 16), which endows the President with ‘exceptional power’ to defend the institutions of the republic, national independence and territorial integrity in the case of an acute crisis, and the 1978 Spanish Constitution (art 6), which requires that political parties are democratically organised¹⁴ as well as the 2015 ‘decommunisation’ laws in Ukraine banning Communist parties from participation in elections.¹⁵ Other states impose substantive restrictions on the

⁹ Arthur Kaufmann, ‘A Small Scale Right to Resist’ (1986) 21 New Eng L Rev 571, 576.

¹⁰ *ibid* 575-76.

¹¹ *ibid* 576.

¹² See *The Quasi-Nazi Socialist Reich Party* (1952) BVerfGE 2, 73; *German Communist Party Case* (1956) BVerfGE 5, 139. For a detailed overview and analysis of the Court’s reasoning, see Jure Vidmar, ‘Multiparty Democracy: International and European Human Rights Law Perspectives’ (2010) 23 LJIL 209, 229.

¹³ The concept ‘militant democracy’ was coined by Karl Lowenstein in 1937. Karl Lowenstein, ‘Militant Democracy and Fundamental Rights I’ (1937) Am Pol Sci Rev 417. See also Gregory H Fox and George Nolte, ‘Intolerant Democracies’ (1995) 36 Harv Int’l L J 1; Hans-Jurgen Papier and Wolfgang Durner, ‘Streitbare Demokratie’ (2003) 128 AoR 340, 345-46; Samuel Issacharoff, ‘Fragile Democracies’ (2007) 120 Harv L Rev 1405, 1408-09; Jan-Werner Muller, ‘Militant Democracy’ in Michel Rosenfeld and Andras Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 1253; Alexandr Kirshner, *A Theory of Militant Democracy: The Ethics of Combating Political Extremism* (Yale UP 2014).

¹⁴ See generally Markus Thiel, *The ‘Militant Democracy’ Principle in Modern Democracies* (Ashgate 2009).

¹⁵ On 15 May 2015, Ukrainian President Petro Poroshenko signed four laws ‘On the condemnation of the communist and national socialist (Nazi) regimes and prohibition of propaganda of their symbols’, ‘On the access to archives of repressive bodies of the Communist

views that parties may hold, such as Turkey, which require fidelity to the principles of secularism and territorial integrity¹⁶ as a condition of eligibility for elected office, and Israel, which prohibits the participation in elections to any party that does not uphold the democratic and Jewish character of the state and incites to racism. Finally, some states refuse the entry to the electoral arena to parties that support terrorist and paramilitary groups, with Spain banning parties sharing the goals of the Basque separatist ETA insurgents being the most prominent case.¹⁷

More recent works in law and political science advocate a shift from militant democracy to ‘defending democracy’, which represents a comprehensive paradigm to protect democracy through civic education and an engagement of civil society, with the outright banning of antidemocratic parties being the measure of last resort.¹⁸ Other common mechanisms (or remedies) to abridge antidemocratic tendencies include ‘tired constitutional amendments thresholds,’ which imply the use of textual provisions to entrench certain vulnerable political issues by requiring higher supermajorities or other mechanisms, and the ‘unconstitutional-constitutional amendments doctrine’, which gives courts the power to strike down certain constitutional amendments that by virtue of their unconstitutionality may undermine the current democratic order.¹⁹

This thesis suggests that neither classical democratic theory nor the modern comparative constitutional law are of help when democracy is overthrown or abused to such an extent that it lost its essential characteristics, such as self-empowerment and equality. In fact, a small-scale right to resist is of no use when legal and institutional framework for its realisation is compromised by authoritarian policies of a government of the day. The doctrine of militant democracy, whilst was intended to protect democracy, is not in effect a remedy but rather a state (pre-emptive) self-defence mechanism, which is highly criticised for its antidemocratic outcomes.²⁰ The same holds

totalitarian regime of 1917-1991’, ‘On the commemoration of the victory over Nazism in the 2nd World War of 1939-1945’, and ‘On the legal status and commemoration of fighters of Ukraine’s independence in the 20th century’. See Ukrainskyi Instytut Nacional’noi Pam’yati, Laws <<http://www.memory.gov.ua/laws?page=1>> accessed 4 August 2016. Prior to this, a set of decrees were issued following Ukrainian independence from the Soviet Union in 1991 banning the Communist Party of Ukraine and seizing its assets. See Alexei Trochev, ‘Ukraine: Constitutional Court Invalidates Ban on Communist Party’ (2003) 1 Int’l J Const L 534, 535.

¹⁶ See Dicle Kogacioglu, ‘Dissolution of Political Parties by the Constitutional Court in Turkey: Judicial Delimitation of the Political Domain’ (2003) 18 Int’l Soc 258.

¹⁷ For an excellent outline of various approaches to antidemocratic mobilizations in the electoral arena, see Samuel Issacharoff, ‘Fragile Democracies’ (2007) 120 Harv L Rev 1405, 1421-51.

¹⁸ See eg Stefan Rummens and Koen Abts, ‘Defending Democracy: The Concentric Containment of Political Extremism’ (2010) 58 Pol Stud 649.

¹⁹ David Landau, ‘Abusive Constitutionalism’ (2013) 47 UC Davis L Rev 189, 193-94, 217.

²⁰ See eg Brad Roth, Response, ‘Democratic Intolerance: Observations on Fox and Nolte’ (1996) 37 Harv Int’l L J 235, 237 (‘If one is to say to the people, in essence, “The fundamental principle of democracy dictates that you can have any government except the one the majority of you presently think you want”, there had better be a more compelling argument for democracy than

true for tired constitutional amendments thresholds and unconstitutional-constitutional amendments doctrine. Significantly, on a purely theoretical level, the modern understanding of democratic constitutionalism rests on the assumption that democratic constitution cannot negate its citizens the right to initiate constitutional change because the very idea of a finished constitution is incompatible with democracy.²¹ That being said, the author of this work suggests that revolution is an *ultima ratio* means to restore democracy and an ultimate remedy to effectuate the right to democratic governance. This 'extreme' right will be indispensable 'as long as the international community lacks the means for the effective, worldwide enforcement of fundamental human rights'.²² In other words, because the external mechanisms of collective action in defence of democracy leave much space for improvements in view of their politicisation, inconsistencies, selectivity and regional peculiarities, ascertaining the legal framework for internal response to democratic transgressions is an inalienable constitutive part of the enforcement dimension of the right to democracy. Because revolution's groundedness in law is rather ambiguous on conventional analysis, it is important to first explore its conceptual core and intellectual history. The next two sections are devoted to these issues.

6.1. Revolution: Some Conceptual Issues

Revolution, like the doors of the temple of Janus, has two faces. One is an elegant, abstract and humanitarian face, an idyllic face, the dream of revolution [...] The other is crude, violent and very concrete, rather nightmarish [...].²³

Revolutions are social phenomena which are as old as political thought itself. The term derives from the Latin *revolvere*, 'to revolve'. It was first applied by Copernicus in 1543 in his *On the Revolutions of Celestial Bodies* to describe the rotation of planets. From astronomy, the term migrated to astrology, which studied the heavens with the aim to foresee future. Sixteenth-century astrologers designated by 'revolution' abrupt and unforeseen events occasioned by the location of planets.²⁴ However, the distinct notion of

that it enables the people to choose. There is nothing intrinsically valuable about choosing among undesired options').

²¹ For a more comprehensive debate, see Allan Hutchinson and Joel I Colon-Rios, 'Democracy and Revolution: An Enduring Relationship?' (2013) Victoria University of Wellington Legal Research Paper 19/2013 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1895450> accessed 6 September 2016.

²² Nicholas N Kittrie, 'Patriots and Terrorists: Reconciling Human Rights with World Order' (1981) 13 Case W Res J Int'l L 291, 305.

²³ John Dunn, *Modern Revolutions: An Introduction to the Analysis of a Political Phenomenon* (CUP 1972) 11-12.

²⁴ Richard Pipes, *A Concise History of Russian Revolution* (Vintage Books 1996) xiii.

‘revolution’ as a political event emerged at the end of the seventeenth century. After the Glorious Revolution of 1688-89, which resulted in the dethronement of King James II of England and his replacement by William III of Orange, the term ‘revolution’ entered the sphere of politics.²⁵ In 1776, the term was appropriated by American revolutionaries to describe their struggle for independence from the Great Britain and acquired even more radical connotations. Ultimately, it was the 1789 events in France that gave birth to a modern conception of revolution — ‘mutation soudain, catastrophique et irréversible, orientée selon la dimension du progrès de l’humanité vers un surplus de valeur et de bonheur’.²⁶ In other words, revolution became to be understood as an agglomerate of three key elements: violence, mass mobilisation and rapidity. More recent scholarship added the fourth constitutive element of revolution — impact. The change must have impact reaching beyond ruling-class circles to be truly revolutionary.²⁷

While the concept of revolution has been studied in great detail since then, there is not yet an accepted definition of this social phenomenon. Undoubtedly, most commentators would agree that events such as the French, American, Russian and Chinese revolutions qualify as such. These revolutions not only fundamentally altered the internal structure of a state by substituting power-holders with rebel groups, but also transformed the nature of relationships between individuals and the state by, inter alia, promulgating democratic ideals, enabling the participation of previously excluded groups in political life and facilitating the materialisation of these ideas in constitutional documents. Yet, beyond these four major historical upheavals it becomes less clear.²⁸ Studies of the phenomenon vary from the highly inclusive to the highly exclusive. As Sumida rightly pointed out, ‘[t]he entire continuum of historical events from the palace coup to the “true socioeconomic revolution” to the worldwide system-transforming revolution of modernization has been

²⁵ Société Française pour le Droit International, *Révolution et Droit International* (Pedone 1989) 3-4.

²⁶ Georges Gusdorf, ‘Les sciences humaines et la pensée occidentale’ in George Gusdorf (ed), *Les principes de la pensée au siècle des Lumières* (Payout 1978) 414-28. See also Hannah Arendt, *Essai sur la révolution* (Gallimard 1967) 62, 77 (She claimed that before the 18th century, one cannot find any antecedent to the French Revolution because ‘les droits politiques inaliénables pour tous, en vertu de leur naissance, (cette) chose eut paru à tous les âges précédents (celui-ci) [...] une contradiction dans les termes’). She proceeds that ‘c’est du cours de la Révolution française [...] que l’emploi actuel du mot révolution tire ses harmoniques, ses associations pour tous pays [...]’); François Furet, ‘Au centre de nos représentations politiques’ 9 (1976) *Esprit* 172, 172 (‘La Révolution est une idée neuve dans l’histoire de l’humanité: elle n’a pas 200 ans. C’est la Révolution française qui lui a donné sa valeur sémantique: bel exemple de la coagulation à la fois rationnelle et émotive d’un concept par un événement’); Michel Ganzin, ‘L’émergence du concept moderne de révolution, 1789-1794’ in Michel Ganzin (ed), *L’influence de l’Antiquité sur la pensée politique européenne, XVIe-XXe siècles* (PUAM 1996) 342.

²⁷ Isaac Kramnick, ‘Reflections on Revolution: Definition and Explanation in Recent Scholarship’ (1972) 11 *Hist & Theory* 26, 30.

²⁸ See eg Jack A Goldstone, ‘Theories of Revolution: The Third Generation’ (1980) 32 *Wld Pol* 425, 432; Owen Taylor, ‘Reclaiming Revolution’ (2011) 22 *FYBIL* 259, 263-64.

subsumed under the concept of revolution'.²⁹ Similarly, Joder acknowledged that '[t]he term "revolution" is one of the most used and, one suspects, one of the most misused of words. Both within and without the literature of the social sciences it has acquired a variety of meanings which make it as adaptable to personal purposes as is the chameleon's skin'.³⁰ Hence, the term 'revolution' has been used to designate any type of change, from a change in the location of sovereignty to a change of ideological, economic, and religious fabric of society. Some authors even claim that underlying political, social or economic changes are only material manifestations of revolution, whilst real revolutions occur at the level of values, mores and attitudes towards the traditional institutional order.³¹

The majority of commentators (including the author of this thesis), nonetheless, hold to a political understanding of revolution, that is a change in the location of sovereignty. Whilst such change unavoidably shakes other aspects of social life and might be rooted in a variety of causes, the main rationale behind revolution is a political reversal. This restricted understanding of revolution is clearly visible in the often-cited definition formulated by Huntington: 'A revolution is a rapid, fundamental and violent domestic change in the dominant values and myths of a society, in its political institutions, social structure, leadership and government activity and policies'.³² He elaborates this definition in the following way:

[T]he most significant results of the great revolutions are either precisely in the political sphere or directly related to that sphere. A full-scale revolution involves the destruction of the old political institutions and patterns of legitimacy, the mobilization of new groups into politics, the redefinition of the political community, the acceptance of new political values and new concepts of political legitimacy, the conquest of power by a new, more dynamic political elite, and the creation of new and stronger political institutions. All revolutions involve modernization in the sense of the expansion of political participation; some revolutions also involve political development in the sense of the creation of new patterns of political order.³³

Revolution should be distinguished from other modes of resistance, such as lawful opposition, civil disobedience, rebellion, insurrection, civil riots, national liberation movements, revolts, coups and wars of independence, by virtue of its comprehensive (a high degree of mass participation and/or support) and radical scope (to bring down the whole political structure instead of effectuating a particular legal or policy reform), high intensity (widely

²⁹ Gerald Sumida, 'The Right of Revolution: Implications for International Law and Order' in Charles A Barker (ed), *Power and Law: American Dilemma in World Affairs* (The John Hopkins Press 1971) 130, 136.

³⁰ Dale Yoder, 'Current Definitions of Revolution' (1926) 32 Am J Soc 433, 433.

³¹ *ibid* 441.

³² Samuel Huntington, *Political Order in Changing Societies* (Yale UP 1968) 264.

³³ *ibid* 308.

shared cause and reasonable prospect of permanence)³⁴ and its complete defiance of the laws, policies and decisions of the incumbent government. In fact, revolution can be effectuated by means of the enumerated kinds of activities, at least at certain stages, but it should be understood as a distinct mode of resistance towards a distinct end — a complete, total, overthrow of the existing illegitimate order. As Kramnick observed, '[t]here must be a peculiar direction and purposive orientation to the change; a novel structuring of society, a new and millennial order must be sought'.³⁵ However, some authors tend to view the difference between revolution and other counter-governmental acts as a matter of degree rather than quality. For instance, for Frazier, the difference between revolution and civil disobedience is not that clear-cut as one may think. For him, it would be

[M]uch too simple, to say that the resister asserts his right to defy the state only in certain areas, while the revolutionary preaches complete defiance. It would be too simple because revolutionaries always share some common ground with their opponents. Rather than attempting to speak of resistance and revolution as two distinct modes of action, it seems preferable to consider them as part of a continuum of actions that vary in their degree of opposition to the given order.³⁶

It is a legitimate view but it does not attend a broad scholarly support: 'This linking of the two notions [civil disobedience and revolution] is a mistake [...] it represents a conceptual confusion'.³⁷ Moreover, whilst it is undeniable that in certain circumstances it is difficult to draw a watertight line between revolution and civil disobedience (e.g., Gandhi in India), the underlying goals behind these modes of action are utterly different: deliberate and public infraction of the laws in force to propagate a moderate reform in the case of civil disobedience and wholesale (usually violent) repudiation of the authority of the current legal and political system with a view of their replacement in the

³⁴ This is an essential element of revolution, which distinguishes it from a mere rebellion — sporadic challenge to the established government which remains 'susceptible to rapid suppression by normal procedures of internal security' — and insurrection (insurgency) — 'half-way house between essentially ephemeral, spasmodic or unorganised civil disorders and the conduct of an organised war between contending factions within a State [belligerency]'. See Edre U Olalia, 'The Status in International Law of National Liberation Movements and Their Use of Armed Force' (IAPL 2003) 2.

³⁵ Isaac Kramnick, 'Reflections on Revolution: Definition and Explanation in Recent Scholarship' (1972) 11 *Hist & Theory* 26, 30.

³⁶ Clyde Frazier, 'Between Obedience and Revolution' (1972) 3 *Phil & Pub Aff* 315, 326.

³⁷ Rex Martin, 'Civil Disobedience' (1970) 80 *Ethics* 123, 125. See also Hugo A Bedau, 'On Civil Disobedience' (1961) 58 *J Phil* 653, 656, 661; Carl Cohen, 'Civil Disobedience and the Law' (1966) 21 *Rutgers L Rev* 1, 3 ('Civil disobedience is not revolution. Revolution seeks the overthrow of constituted authority, or at least repudiates that authority in some sphere; civil disobedience does neither. The civil disobedient accepts, while the revolutionary rejects, the frame of established authority and the general legitimacy of the system of laws'); Carl Cohen, 'What Civil Disobedience Is Not' in Carl Cohen (ed), *Civil Disobedience: Conscience, Tactics, and the Law* (1st edn 1971, MPublishing 2013) 42ff.

case of revolution. In other words, whereas civil disobedience typically involves a certain willingness to ‘work with the system’, revolution, conversely, seeks to overthrow it.³⁸ Revolution is, in short, an illegal change in what are considered the fundamental principles of legality.

Yet, the most widespread conceptual confusion is observable between the concept of revolution and that of *coup d’état*. On the one view, the distinction is hardly to overlook. First, military coups are typically conducted by small bands consisting of individuals used to hold governmental offices, whereas ‘*grandes révolutions*’ are sparked by mass political action. Second, the main goal of the usurpers is usually to displace the incumbent government without necessarily seeking to bring about broader social reforms, whereas revolution cuts deeper into the existing structure of a society and profoundly alters its socio-political institutions. Thus, while the both phenomena involve the overthrow of an established government, revolution is the most dramatic and far-reaching event, which brings about fundamental change in the political system itself, as opposed to a mere change in the dominant political policy or the replacement of the governing elite.³⁹ Some authors, nonetheless, claim that *coups d’état* are a type of revolution as they ‘break down decades-old governance structures and replace them with a new regime’.⁴⁰ For Kelsen, a revolution occurs whenever the legal order is replaced in an illegitimate way, in way not envisaged by the former order. It is, thus, irrelevant whether the replacement is effectuated by means of violent uprising or in a peaceful way. It is also irrelevant whether revolution is carried out by masses or through the action of those in government positions.⁴¹ Hence, in this context, any illegitimate usurpation of power, that is in contradiction to the constitution, is a revolution. In the way similar to Kelsen, Muhammad Munir defines revolution in the following manner:

A revolution is generally associated with public tumult, mutiny, violence and bloodshed but from a juristic point of view the method by which and the persons by whom a revolution is brought about is wholly immaterial. The change may be attended by violence or it may be perfectly peaceful. It may

³⁸ Frederic Megret, ‘Civil Disobedience and International Law: Sketch for a Theoretical Argument’ (2008) 46 Can YBIL 143, 166. See also Hugo A Bedau, ‘On Civil Disobedience’ (1961) 58 J Phil 653, 661 (‘Anyone commits an act of civil disobedience if and only if he acts illegally, publicly, nonviolently, and conscientiously with the intent to frustrate (one of) the laws, policies, or decisions of his government’).

³⁹ Andrew Heywood, *Politics* (Macmillan Press 1997) 198. See also Crane Brinton, *The Anatomy of Revolution* (Vintage 1952) 3-4; George Blanksten, ‘Revolutions’ in Harold E Davis (ed), *Government and Politics in Latin America* (Ronald Press 1958) 72; David P Forsythe, *Human Rights and Peace: International and National Dimensions* (University of Nebraska Press 1993) 56.

⁴⁰ Ozan O Varol, ‘The Democratic Coup d’État’ (2012) 53 Harv Int’l L J 292, 307-08.

⁴¹ Hans Kelsen, *General Theory of Law and State* (Anders Welberg tr, Harvard UP 1946) 115, 209. See also Krystyna Marek, *Identity and Continuity of States in Public International Law* (Droz 1954) 25 (‘[Revolution] covers every change in the legal order of the state other than one brought about by constitutional means’).

take the form of a coup d'état by a political adventurer or it may be effected by persons already in public positions.⁴²

Once again *coup d'état* is but one manifestation of a revolution. Likewise, Tanter and Midlarsky suggest that '[a] revolution may be said to exist when a group of insurgents illegally and/or forcefully challenges the governmental elite for the occupancy of roles in the structure of political authority'.⁴³ It is clear from the definition that the authors view any replacement of the ruling elite in contradiction with the constitution of the day as a revolution. Moreover, drawing on the work of Huntington, they suggest four types of revolution: mass revolution, revolutionary coup, reform coup and palace revolution.⁴⁴ Thus, *coups d'état* are, on their account, subspecies of a revolution. Only their concept of 'mass revolution' akin to the 1776 American Revolution and the 1789 French Revolution, or 'Great Revolutions' as George Pettee calls them,⁴⁵ corresponds to the definition of revolution as the term is used in this study. Such conceptual ambiguity between revolution and military coup is understandable, at least in legal science, since jurists do not have appropriate tools to measure sociological impact of the event in order to categorise it. All they can ascertain is whether a government was replaced according to the rules in place or in violation thereof. Should the existing succession rules have been violated, it is not legally relevant what cause they pursued. Such confusion is also enhanced by the fact that the notion of revolution is increasingly becoming elastic and 'transcendental'⁴⁶ to serve its original goal of emancipation and salvation to ever-broader strata of actors emancipated by the progressive human rights rhetoric and seeking only a limited change in policy within their respective governments, instead of the radical restructuring of the political system. To illustrate, a chain of mass demonstrations in the Arab world and particularly in Ukraine, demanding greater democratisation and improved human rights record in the countries which had not been hostile to democracy and human rights and even rhetorically committed to these values, implied that the revolutionary cause was not a *significant* or *complete* change but rather the improvement and strengthening of the order which had already been there but

⁴² *The State v Dosso and Another* 1958 PLD 538 (Supreme Court of Pakistan).

⁴³ Raymond Tanter and Manus Midlarsky, 'A Theory of Revolution' (1967) 11 J Conflict Resol 264, 267.

⁴⁴ *ibid* 266. Huntington on his part differentiated between four categories of revolution: the internal war, the revolutionary coup, the reform coup and the palace revolution. Samuel Huntington, 'Patterns of Violence in World Politics' in Samuel Huntington (ed), *Changing Patterns of Military Politics* (Free Press 1962) 17-50. A similar theoretical division was developed by Rosenau who distinguished between personnel wars (palace revolution), authority wars (revolutionary and reform coups) and structural wars (mass revolution). James N Rosenau, 'Internal War as an International Event' in James N Rosenau (ed), *International Aspects of Civil Strife* (Princeton UP 1964) 63-64.

⁴⁵ George S Pettee, *The Process of Revolution* (Howard Fertig 1938). These revolutions are also designated as '*révolutions internationalistes*' which target not only the domestic order of a particular state but also the international legal order. See also Société Française pour le Droit International, *Révolution et Droit International* (Pedone 1989) 18.

⁴⁶ Owen Taylor, 'Reclaiming Revolution' (2011) 22 FYBIL 259, 263.

failed to be fully put in practice. However, the author of this study asserts that the distinction between *coup d'état* and revolution is deeper than merely the extent of mass support and the scope of socio-political change. Whilst *coup d'état* is a denial of the peoples' right to dispose of themselves, revolution is the affirmation of this right; whereas *coup d'état* is a violation of democratic entitlement, revolution is a remedy for its vindication.

Last but not least, some commentators distinguish between democratic (virtuous) and non-democratic (vicious) revolutions, what have become to be known as a 'democratic revolution theory'. For them, a revolution is democratic, and thus legitimate, if the revolutionary regime institutes democratic rule and governs in accordance with the recognised international norms, whilst non-democratic revolution does not yield mass support and leads to the establishment of undemocratic regime.⁴⁷ For the purposes of the present study, this distinction is redundant as revolution, as the notion is used in this paper, is always democratic as it is always characterised by mass support (albeit may not necessarily lead to the establishment of a fully-fledged democratic regime), whilst the notion of 'non-democratic revolution' is subsumed by other forms of resistance discussed above. The main reason why this work does not subscribe to the definition of a democratic revolution, as is developed by the proponents of the democratic revolution theory, is the latter's conceptualisation of a 'legitimate' revolution as a 'wait and see' phenomenon whereby the normative question of legitimacy of revolution is conflated with assessment of the post-revolutionary environment in terms of its democratic progress.⁴⁸ In other words, one cannot know whether the popular upheaval is a realisation of the right to revolution until a post-revolutionary government establishes itself. Thus, for the purpose of the present study, a revolution is a mass uprising aimed at the unseating of the (repressive) ruling government along with the fundamental change of the institutional structure of the political system, typically pursued by violent means and in disobedience to the laws of the implicated state. Uprising is mass whenever it is characterised by popular dissatisfaction, whether without direct involvement or with overt complicity or active support of the insurgents.

Democracy and the right of revolution are intrinsically linked. Both concepts spring from the principle of popular sovereignty and are founded on

⁴⁷ See eg Ali Khan, 'A Legal Theory of Revolutions' (1987) 5 BUJ Int'l L 2; Richard Albert, 'Democratic Revolutions' (2011) <https://www.researchgate.net/publication/228284070_Democratic_Revolutions> accessed 8 March 2016; Kalkidan Obse, 'The Arab Spring and the Question of Legality of Democratic Revolution in Theory and Practice: A Perspective Based on the African Union Normative Framework' (2014) 27 LJIL 817, 821. For criticisms, see Tuan Samahon, 'Democracy, Violence, and Constitutional Revision in the Shadow of Democratic Revolution Theory' (2011) Villanova University Working Paper 2013-3012 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1968424> accessed 7 September 2016.

⁴⁸ This valuable point was borrowed from Kalkidan N Obse, 'The "African Spring" and the Question of Legitimacy of Democratic Revolution in Theory and Practice' in the 6th Graz Workshop on the Future of Security, *An African Spring? Human Rights and Security in Times of Change* (University of Graz 2014) 240.

the ever-present imperative of equality and empowerment. Moreover, both concepts are constitutive aspects of internal self-determination as they represent an inherent right of people to decide on their political, social and economic development. However, whilst democracy entails peaceful means to effectuate governmental change, revolution envisages forceful, often violent, overthrow of the incumbent government. Moreover, whilst the constitution of the day represents an inalienable ‘codifying’ framework which is essential for the effective functioning of democracy, revolution presupposes rejection of the old constitutional order and establishment of a new one. Revolution can also be viewed as an ultimate political tool to install democracy as well as to disrupt it. Ultimately, revolution is one of the remedies, sometimes the only one, that people have when their right to democracy has been abridged. It is the last aspect of revolution that this thesis will focus on. The thesis will argue that revolution is a remedy, or a human right to remedy, so to speak, to which everyone is entitled when democracy is in peril and other less radical means to reinstall democratic rule are not available or their use will not bring the wished result within a reasonable timespan.

6.2. Philosophical Foundations of the Right of Revolution

The idea that revolution can take form of a right, which has also been commonly defined as the right to resist, the right of resistance, the right to rebel and the right of rebellion,⁴⁹ has evolved gradually both in Western and Eastern legal traditions. As Arendt observed, ‘whatever political organization man may have achieved has its origin in crime’.⁵⁰ Whilst the earliest proclamations of the right to revolution drew their justification from some higher form of law beyond the government’s boundaries, subsequent invocations of the right at stake were based on a more diverse array of motivations.

⁴⁹ Some scholars tend to distinguish between the right to resist (right of resistance) and the right to rebel (right of rebellion). For them, the right to resist is an umbrella concept entailing both violent and non-violent dimensions. Only the latter can be properly called ‘the right of rebellion’. See Yulia Razmetaeva, ‘The Right to Resist and the Right of Rebellion’ (2014) 21 *Jurisprudence* 758, 774. Likewise, Kaufman distinguishes between ‘justified resistance’ and ‘revolution’. For him, the right to resist, as opposed to the right to revolution, is aimed at a restoration of a constitutional order, not its complete displacement, and requires some degree of proportionality. Arthur Kaufmann, ‘A Small Scale Right to Resist’ (1986) 21 *New Eng L Rev* 571, 574-75. On Honore’s account, revolution is a species of rebellion; it is a ‘rebellion which results in drastic social or political change’. Tony Honore, ‘Right to Rebel’ (1988) 8 *Oxford J Leg Stud* 34, 38. Finally, Minh differentiates between the right to resistance and the right to revolution (the right to rebel) on the ground of their divergent nature. Whereas the former is an essentially individual right which can also be exercised collectively, the latter belongs solely to the people. Tran Van Minh, ‘Political and Juridical Sanctions against Violations of Human Rights’ in UNESCO (ed), *Violations of Human Rights: Possible Rights of Recourse and Forms of Resistance* (Imprimerie des Press Universitaires de France 1984) 164. This study treats the mentioned terms interchangeably.

⁵⁰ Hannah Arendt, *On Revolution* (first published 1963, Penguin 2006) 10.

In the West, some of the earliest discussions on revolution as a right can be found in the works of Plato, who argued in his *Republic* that people stripped of power and resources by their tyrant will strive for freedom and liberty and, thus, spark a revolution.⁵¹ He also admitted a possibility of the tyrant's assassination if no other means to stop his rule are available.⁵² This idea, which became to be known as a theory of tyrannicide,⁵³ was transmitted to Roman law, whose extremely influential *Corpus Juris* declared that 'it is lawful to repel violence by violence'.⁵⁴ This provision was widely interpreted as justifying resistance against tyranny.

In the thirteenth century, Thomas Aquinas wrote in *Summa Theologica* that '[a]ll who govern in the interests of themselves rather than of the common good are tyrants [...] Against the regime's efforts to enforce its decrees, one has the right of forcible resistance; as a private right this could extend as far as killing the tyrant as a foreseen side-effect of one's legitimate self-defence'.⁵⁵ Importantly, in Aquinas' understanding, resisting tyranny was not rebellion *per se* but a struggle against unjust dominion, which itself amounted to a rebellion against the legal order. The right of assassination of the unethical tyrant was also advocated by John Salisbury in his *Policraticus*. For him, a tyrant is the 'image of depravity [...] [who] [...] springs from evil and should be cut down with the axe wherever he grows'.⁵⁶ To depict the right of violent resistance as not merely entitlement but also as a duty was common in the Middle Ages. Moreover, the development of the nation-state at the Late Middle Ages was accompanied by the need to codify existing law, including the right of revolution. Thus, the 1215 Magna Carta, an English charter that required the king to renounce certain rights, included a 'security clause' that entitled the barons, in the case some of its provisions are violated, to take hold of the king's possessions, lands and castles and resort to any other means whilst sparing the king's family 'until the excess shall have been redressed'.⁵⁷ Similar provisions were included in the Golden Bull of 1222, edict issued by King Andrew II of Hungary. The Golden Bull enshrined the rights of noblemen in Hungary,

⁵¹ Plato, *The Republic*, Book VIII (Benjamin Jowett tr) <<http://classics.mit.edu/Plato/republic.9.viii.html>> accessed 8 September 2016.

⁵² Plato, *The Republic*, Book VII (Benjamin Jowett tr) 340 <<http://classics.mit.edu/Plato/republic.9.viii.html>> accessed 8 September 2016.

⁵³ See Oscar Jaszi and John D Lewis, *Against the Tyrant: The Tradition and Theory of Tyrannicide* (The Free Press 1957); James F McGlew, *Tyranny and Political Culture in Ancient Greece* (Cornell UP 1993) 185-87.

⁵⁴ Cited in David Kopel, 'The Scottish and English Religious Roots of the American Right to Arms: Buchanan, Rutherford, Locke, Sidney, and the Duty to Overthrow Tyranny' (2005) 12 BRIDGES 291, 298.

⁵⁵ Thomas Aquinas, *Summa Theologica [A Treatise on Theology]* (Parts I-II, Fathers of the English Dominican Province tr, Catholic Way Publishing 2014) 104.

⁵⁶ John Salisbury, *Policraticus* (Cary J Nederman ed, CUP 1990) 191. See also Karen Bollermann and Cary Nederman, 'John of Salisbury', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2006) <<http://plato.stanford.edu/entries/john-salisbury/#5.3>> accessed 8 September 2016.

⁵⁷ Ralph V Turner, *Magna Carta: Through the Ages* (Pearson Education Ltd 2003) 235 (citing art 6 of the Magna Carta).

including the right to disobey (*jus resistendi*) the King when he acted in contravention to law.⁵⁸ Likewise, the thirteenth-century German *Sachsenspiegel*⁵⁹ as well as the 1573 Henrician Articles⁶⁰ contain clauses authorising the ouster of the king should he fail to adhere to the terms of the respective agreement.

In the modern period, Jean Calvin, while insisting upon a general obligation of Christians to obey their rulers, contended that magistrates had a positive duty to protect the people's freedoms against their leader who disobeyed God's will. While he did not explicitly teach a right to revolution, his works laid solid grounds for this idea.⁶¹ In 1644, the Scottish Presbyterian Samuel Rutherford published *Lex Rex: or the Law and the Prince*, where he argued that resistance to tyranny is not only a right but a Christian duty. He extrapolated this right from the natural law right to self-defence.⁶² The right of rebellion was also recognised, albeit in a paradoxical manner, by the founding father of modern international law Hugo Grotius. On the one hand, he appealed to a social contract theory to disqualify any violent resistance: the establishment of a state requires that 'the State has a power to prohibit the unlimited Use of that Right'.⁶³ The very existence of the state, so the argument runs, would be endangered if the right to violent resistance existed. On the other hand, he accepted that 'some of the Laws of God, however general they be, seem to admit of tacit Exceptions in Cases of extreme Necessity'.⁶⁴ In other

⁵⁸ 'We have also decreed that if we or any of our successors at any time should seek to oppose the terms of this settlement, both the bishops and other retainers (*iobagiones*) as well as the nobles of the realm, singularly and in common, shall by this authority have the right in perpetuity to resist and speak against us and our successors without the stain of faithlessness'. Cited in Martyn Rady, 'Hungary and the Golden Bull of 1222' (2014) 24 *Banatica* 87, 92.

⁵⁹ It is the most important law book of the German Middle Ages which codifies customary law. The provision justifying rebellion reads as follows: 'And a man must even resist his king and judge if he does wrong, and even help to fight him by any means, even if he is his kinsman or liege lord. And in so doing he does not breach his duty of loyalty'. Cited in Heiner Bielefeldt, 'The Right to Resist' in Wilhelm Heitmeyer and John Hagan (eds), *International Handbook of Violence Research* (Springer 2003) 1098.

⁶⁰ It was a permanent contract between the Polish nation (eg the *szlachta* (nobility)) of the Polish-Lithuanian Commonwealth and a newly elected king, which provided for the fundamental principles of governance and constitutional law. One of its provisions stated that if the monarch was to transgress against the law or the privileges of *szlachta*, the latter was authorised to refuse to abide by the king's orders and act against him, which in Polish practice became known as *rokosz*. See Jack Jedrch, *Constitutions, Elections and Legislatures of Poland, 1493-1977: A Guide to Their History* (UP of America 1982) 88-91.

⁶¹ Fred W. Beuttler, 'Revolution, Right of', *Encyclopedia.com* (2003) <<http://www.encyclopedia.com/doc/1G2-3401803594.html>> accessed 18 January 2016. See also Robert M. Kingdom, 'Calvinism and Resistance Theory' in JH Burns (ed), *The Cambridge History of Political Thought 1450-1700* (CUP 2008) 205.

⁶² David Kopel, 'The Scottish and English Religious Roots of the American Right to Arms: Buchanan, Rutherford, Locke, Sidney, and the Duty to Overthrow Tyranny' (2005) 12 *BRIDGES* 291, 294-99.

⁶³ Hugo Grotius, *De Jure Belli ac Pacis*, cited in Eric Mack, 'Grotius on the Right of Resistance', *Online Library of Liberty* <<http://oll.libertyfund.org/pages/lm-grotius>> accessed 1 February 2016.

⁶⁴ *ibid.*

words, although Grotius insisted that individuals when establishing a state forfeit their ‘promiscuous’ (unlimited) right to resist, they retain a qualified right to resist utter injustice. Emmerich de Vattel absorbed this idea and developed it further in his just war theory by introducing an element of proportionality: ‘When mild and innocent remedies can be applied to the evil, there can be no reason for waiting until it becomes extreme’.⁶⁵

In the Age of Enlightenment, one of the most important contributions to the development of the right of revolution was John Locke’s *Two Treatises of Government*. The right of revolution formed an integral part of his social contract theory: since governments exist by the consent of the people in order to protect their rights and public good, governments that are incapable to perform towards these ends can be resisted and overthrown because tyranny erased the social contract and put the people back into a state of nature. As a natural law protagonist, he claimed that a right to revolution was a natural right given its roots in the natural right of self-defence.⁶⁶ Locke’s conceptualisation of popular revolt as an enforcement mechanism for the social contract helped crystallise the philosophical underpinnings of the contemporary right to resist. Another Enlightenment scholar, Montesquieu, was highly influenced by Locke’s ideas: ‘[I]f a prince, very far from making his subjects live happy, endeavors to oppress and ruin them, the foundation of obedience ceases; nothing ties them, nothing attaches them to him, and they return to their natural liberty’.⁶⁷ Moreover, he claimed that because people’s power is not unlimited it could not have been transferred to the ruler: ‘[W]e cannot [...] give to another more power over us, than we have ourselves’.⁶⁸ The right of revolution was also considered by Kant, although in a rather paradoxical fashion. In many of his works he condemns revolution: a constitution cannot have within it a positive law sanctioning the abrogation of the constitution, law cannot permit lawlessness,⁶⁹ ‘there is no right of sedition, much less a right of revolution’.⁷⁰ However, his opposition to revolution was not unequivocal: the successful revolution ‘binds the subjects to accept the new order of things as good citizens, and they cannot refuse to honor and obey the suzerain [*Obrigkeit*] who

⁶⁵ Emmerich de Vattel, *The Law of Nations* (Joseph Chitty ed, T & JW Johnson & C 2001) 20.

⁶⁶ See John Locke, *Two Treatises of Government and a Letter Concerning Toleration* (Ian Shapiro ed, Yale UP 2003) 127 (‘[W]hensoever the Legislators endeavour to take away, and destroy the Property of the People, or to reduce them to slavery under Arbitrary Power, they put themselves in a state of War with the People, who are thereupon absolved from any farther Obedience’).

⁶⁷ Charles Louis de Secondat, Baron de Montesquieu, *Complete Works of M de Montesquieu* (Vol 3, T Evans 1777) *Online Library of Liberty*, 260 <<http://oll.libertyfund.org/titles/montesquieu-complete-works-vol-3>> accessed 8 September 2016.

⁶⁸ *ibid*.

⁶⁹ Lewis W Beck, ‘Kant and the Right of Revolution’ (1971) 32 *J Hist Ideas* 411, 413-14. See also Christine M Korsgaard, ‘Taking the Law into Our Hands: Kant on the Right to Revolution’ in Andrews Reath and others (eds), *Reclaiming the History of Ethics: Essays for John Rawls* (CUP 1997) 235-37.

⁷⁰ Immanuel Kant, *Metaphysical Elements of Justice: The Complete Text of the Metaphysics of Morals, Part I* (John Ladd tr, 2nd edn, Hackett Publishing Company 1999) 125.

now possesses authority'.⁷¹ Thus, while roundly criticising revolutionary attitudes, Kant acknowledged the legitimacy of successful revolution.

The ideas of the Enlightenment scholars became the principal justification for the American and French revolutions and eventually found their way to the two classical declarations, which for the first time in history proclaimed the right to revolution as a universal human right. American Declaration of Independence of 1776 asserts that 'wherever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government'.⁷² Similarly, the French one of 1789 proclaims that '[t]he aim of every political association is the preservation of the natural and imprescriptible rights of Man. These rights are Liberty, Property, Safety and *Resistance to Oppression*'.⁷³ A decade later, the French Constitution of 1793 declared in para 35: 'When the government violates the rights of the people, insurrection is for the people, and for every portion thereof, the most sacred of rights and the most indispensable of duties'. These ideas were also exported to other parts of the world in works, such as Thomas Paine's *Rights of Man* (1791), which posits that mass revolution is permissible when a government fails to safeguard the natural rights of its people: 'Sovereignty, as a matter of right, appertains to the nation only, and not to any individual; and a nation has at all times an inherent, indefensible right to abolish any form of Government it finds inconvenient'.⁷⁴ In his later work, he suggested that '[i]t is possible to exclude men from the right of voting, but it is impossible to exclude them from the right of rebelling against that exclusion; and when all other rights are taken away the right of rebellion is made perfect'.⁷⁵

However, the establishment of international law as a positivist science in the nineteenth and early twentieth centuries led to the rejection of the right to resist. It was considered to be replaced by the modern mechanisms of judicial review and the rule of law. As one prominent scholar of that time observed, it became superfluous and obsolete: 'With the spread of the constitutionally based rule of law, therefore, the theory of resistance had become sociologically defunct. Its legal and moral premise had been satisfied; its logical justification for existence had ceased to exist'.⁷⁶ The period of decay of the doctrine of

⁷¹ *ibid* 128.

⁷² The Declaration of Independence (4 July 1776) preamble <http://www.archives.gov/exhibits/charters/declaration_transcript.html> accessed 8 September 2016.

⁷³ *Déclaration des droits de l'homme et du citoyen* (26 August 1789) art 2 <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/la-constitution-du-4-octobre-1958/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789.5076.html>> accessed 8 September 2016 (emphasis added).

⁷⁴ Thomas Paine, *Rights of Man*. *Wordsworth Classics of World Literature* (Derek Matravers and Tom Griffiths eds, Wordsworth Editions Limited 1996) 103.

⁷⁵ Thomas Paine, *Dissertation on First Principles of Government* (1795), *University of Oxford Text Archive* 26 <<http://ota.ox.ac.uk/desc/3712>> accessed 8 September 2016.

⁷⁶ Kurt Wolzendorf, *Staatsrecht und Naturrecht in der Lehre vom Widerstandsrecht des Volkes. Zugleich ein Beitrag zur Entwicklungsgeschichte des modernen Staatsgedankens* (2nd edn,

revolution did not last long, however. The rise of Nazi Germany and the attendant atrocities it committed in the name of civilisation, prompted a renewed interest in the right to resist. The much-quoted ‘Radbruch’s formula’ succinctly reflected the changing mood of that time: ‘[P]ositive law, secured by constitution and by force, takes precedence even if it is substantively unjust and inexpedient, unless the contradiction of positive law reaches such an intolerable level that the law, as an “unjust law”, has to yield place to justice’.⁷⁷ After the end of WWII, Germany incorporated the right to resist in some of its Land constitutions⁷⁸ and in 1968 in the *Grundgesetz* of the Federal Republic of Germany.⁷⁹

These post-war developments did not remain unnoticed in academic circles. Camus in his *L’Homme Révolté* justified the right of revolution by appealing to a moral rule grounded in human nature which requires those who face intolerable conditions to act against those who created these conditions and/or are complicit in their maintenance.⁸⁰ Like Camus, Honderich concluded that in certain cases, the acts of political violence remain the only available means to achieve particular aims, such as equality and possibility to partake in political life of one’s community, within a reasonable span of time.⁸¹ By the same token, Stephen Carter in his celebrated *Massey Lectures* asserted that if it is dissent, not consent, that democratic rule is meant to facilitate, then the morality of revolution seeks in the same spirit not to dry out the seeds of dissent but rather to sow them into fields of consent. On his account, there is no higher authorising force than citizens themselves *en masse* giving expression to their convictions.⁸² So widely endorsed is now this doctrine that one prominent international lawyer concluded that ‘the right of a people to revolt against tyranny is now a recognized principle of international law’.⁸³

The right of revolution was also recognised in Chinese legal tradition through the promulgation of the concept of the Mandate of Heaven. The Mandate of Heaven is an ancient Chinese belief, which originated during the

Scientia Verlag 1968) 534, cited in Heiner Bielefeldt, ‘The Right to Resist’ in Wilhelm Heitmeyer and John Hagan (eds), *International Handbook of Violence Research* (Springer 2003) 1099.

⁷⁷ Gustav Radbruch, ‘Gesetzliches Unrecht und übergesetzliches Recht’ in Gustav Radbruch (ed) *Rechtsphilosophie. Studienausgabe* (First published 1946, CF Muller 1999) 211-19.

⁷⁸ Article 147 of the Hessian constitution of 1946: ‘It is the right and duty of every citizen to resist the unconstitutional exercise of violence by the public authority’. Article 23(3) of the Berlin constitution of 1950: ‘If the basic rights laid down in the constitution are clearly being violated, every citizen has the right to resist. Both quoted in Ulrich Klug, ‘Das Widerstandsrecht als allgemeines Menschenrecht’ in Werner Hill (ed), *Widerstandsrecht und Staatsgewalt. Recht im Streit mit dem Gesetz* (Gerd Mohn 1984) 11-23.

⁷⁹ Gesetz zur Ergänzung des Grundgesetzes [Law Amending Basic Law] (24 June 1968) BGBl 709, art 20(4) (‘All Germans shall have the right to resist any person attempting to abolish this constitutional order, if no other remedy is available’).

⁸⁰ Albert Camus, *L’Homme Révolté* (Editions Gallimard 1951) 310-14.

⁸¹ Ted Honderich, *Three Essays on Political Violence* (First Edition 1976).

⁸² Stephen L Carter, *The Dissent of the Governed: A Meditation of Law, Religion, and Loyalty* (Harvard UP 1999) 41.

⁸³ Ellery C Stowell, *Intervention in International Law* (John Byrne 1921) 354.

Zhou Dynasty (1046-256 BC) and was championed by a Chinese philosopher Mencius. According to this belief, heaven (*tian*) granted emperors the right to rule if they were sufficiently virtuous to rule justly and in public good. If a ruler failed to govern in accordance with normative ethical standards (*li*), natural and/or social disasters would ensue. The theory of the Mandate of Heaven is often identified with the right of rebellion, even though it is not explicit about this. According to Mencius, it was *tian*, and not the people, as a source of constraint but the people's behaviour reflected the will of heaven.⁸⁴ This has led many contemporary scholars to argue that Mencius doctrine of the Mandate of Heaven is supportive of the right to rebel,⁸⁵ albeit to be exercised only by noble families.⁸⁶ If a rebellion was successful in overthrowing the emperor, it was an indication that he lost his Mandate of Heaven and the rebel leader had gained it.⁸⁷ Although the right of revolution is not coded into any official law, it is still considered as a moral right in China.

The right of revolution is also firmly rooted in Islamic legal thought. The classical Islamic discourse on rebellion developed in the late second/eighth centuries and continued to be restated and re-articulated until the eleventh/seventeenth centuries. The early Islamic legal tradition propagated a duty of obedience to those in power, even if the one in power is a 'mutilated Abyssinian slave'.⁸⁸ The counter-obedience discourse can be, nonetheless, derived from Qur'an. For instance, it states: 'Why do you fail to fight in the cause of God, and for the oppressed men, women, and children who pray, "O Lord, get us out of this city whose peoples are oppressors, and send us by Your Will an ally and send us an aid"'.⁸⁹ Although it is clear that Qur'an refers to injustice and oppression and not rebellion, 'it does create a powerful symbolic construct that can be easily utilized to justify armed resistance to oppression'.⁹⁰ It is in fact due to this contradiction between the Qur'anic symbolism and the

⁸⁴ Sungmoon Kim, 'Confucian Constitutionalism: Mencius and Xunzi on Virtue, Ritual, and Royal Transmission' (2011) 73 Rev Pol 371, 380.

⁸⁵ See Elizabeth J Perry, *Challenging the Mandate of Heaven: Social Protest and State Power in China* (Taylor & Francis Inc 2002) ix; Justin Tiwald, 'A Right of Rebellion in the Mengzi?' (2008) 7 DAO 269, 270; See also Chung-Sho Lo, 'Human Rights in the Chinese Tradition' in Jacques Maritain (ed), *Human Rights: Comments and Interpretations* (UNESCO ed, Allan Wingate 1949) 185, 186-87.

⁸⁶ Justin Tiwald, 'A Right of Rebellion in the Mengzi?' (2008) 7 DAO 269, 270; Sungmoon Kim, 'Confucian Constitutionalism: Mencius and Xunzi on Virtue, Ritual, and Royal Transmission' (2011) 73 Rev Pol 371, 385.

⁸⁷ See Kallie Szczepanski, 'What is the Mandate of Heaven in China?' <<http://asianhistory.about.com/od/ancientchina/f/What-Is-The-Mandate-Of-Heaven.htm>> accessed 21 January 2016. See also Jiang Yonglin, *The Mandate of Heaven and the Great Ming Code* (University of Washington Press 2011).

⁸⁸ See Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (CUP 2001) 112 (quoting Al-Shaybani, *Kitab-al-Sunnah* 29, 445, 491).

⁸⁹ Qur'an 4:75.

⁹⁰ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (CUP 2001) 118-19. See Qur'an 9:12, 23:34, 43:54. See also Niaz Shah, 'The Use of Force under Islamic Law' (2013) 24 EJIL 343, 345 ('The Qur'an provides clear evidence for the use of force in self-defence and for defending other Muslims who are oppressed but unable to defend themselves').

traditions of obedience that some scholars claimed that the doctrine of absolute obedience was illegitimately fabricated.⁹¹ Be this as it may, numerous authoritative reports as well as the works of most Islamic jurists of the time reveal the acceptance of legitimacy of rebellion by endorsing two main ideas, namely that (1) ruler should only be obeyed if he rules fairly; and (2) rebels should not be held liable for life and property destroyed during the course of insurrection.⁹² Doctrinal discourses eventually led to the emergence of the law of rebellion.

In the modern age, this classical discourse has been largely ignored and supplemented by a reconstructed debate on waging *jihad* against corrupt and unjust rulers.⁹³ *Jihad* (just struggle) was originally conceived as a spiritual struggle in the defence of Islamic faith. It eventually evolved into a state doctrine justifying the use of force in self-defence to resist aggression and in the post-Prophet period as a basis for conquest. Since the nineteenth century, the doctrine acquired an entirely new dimension: it ceased to be an exclusively state doctrine and became increasingly invoked by non-state actors as a justification for revolutionary use of force against corrupt and inefficient national regimes.⁹⁴ A host of less deserved armed groups developed the offensive theory of jihad (as opposed to the defensive jihad envisaged in Islamic law) to target governments and the international community as a whole by advancing radical visions of Islam.⁹⁵

In summary, it is clear from the above discussion that the right to resist, or the right to revolution as the term is used in this work, has deep intellectual roots and has existed in various political traditions across time and space. The emergence and development of this right across the globe has a common feature, namely the idea that the right of resistance was coined as a check against abusive state power. Its evaluative function of government performance was first based on certain external standard, such as God, nature, reason etc., and later on it was derived from the social underpinnings of the state itself, such as the social contract theory. The *raison d'être* of the entitlement to rebel has been the idea that the government mindful of the potential legitimate rebellion would most likely administer its power justly, or at least more moderately, than if it was not. Whilst the views of the world-renowned philosophers do not carry legal authority *per se*, as they used to do in the past, they provide an important evidence of the right to revolution's global pedigree and acceptance on the level of ideas.

⁹¹ See Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (CUP 2001) 119.

⁹² *ibid* 121-25, 135ff.

⁹³ *ibid* 5.

⁹⁴ See Cherif Bassiouni, 'Evolving Approaches to Jihad: From Self-Defense to Revolutionary and Regime-Change Political Violence' (2007) 8 *Chi J Int'l L* 119, 124, 129-30. See also Rudolph Peters, *Islam and Colonialism: The Doctrine of Jihad in Modern History* (Mouton 1979) 39-165.

⁹⁵ Niaz Shah, 'The Use of Force under Islamic Law' (2013) 24 *EJIL* 343, 346-57.

6.3. Revolution and International Law

The conceptual ambiguity of the notion of revolution is paralleled by the uncertainty as to its legal status. It is commonly asserted that today's international law is not concerned with revolutions. Whilst the world's grandest revolutions took place in the Western hemisphere, such as the American revolution of 1775-83, the French revolution of 1789, the European revolutions of 1848 and the 1917 Soviet revolution, the West seems hesitant to evoke this principle in the twenty-first century. According to the orthodox view, international law does not address the question of regime legitimacy, and revolutions are thus simply facts (*fait accompli*) that are neither legal nor illegal under international law: 'International law does not address the problem. It is legally neutral about it'.⁹⁶ It means that any internal conflict or insurrectionary movement will be in violation of domestic law of the state where it occurs but not international law.⁹⁷ This is partially due to the fact that revolution has been predominantly viewed as a 'pathology' which can disrupt legal systems.⁹⁸ This view is authoritatively echoed by Halliday insisting on revolution's lack of 'fit' or 'out-of-placeness'⁹⁹ in social sciences: 'the study of revolution is not at home in any of the social sciences'.¹⁰⁰

This widely-shared view on revolution as an aberration or abnormality is unsettling if one considers the direct and long-term effects of revolutions (or more precisely revolutionary ideas) on the evolution and development of international law. For instance, the French revolution was sparked by the ideas of Enlightenment philosophers whose conception of natural equality served a new foundation and a new justification for the principle of sovereign equality: all states were recognised equal irrespective of their size and wealth. This principle constitutes one of the cornerstones of the international community

⁹⁶ Report of the Commission of Jurists (Larnaude, Huber, Struycken), LNOJ Sp Supp No 3 (October 1920) 5-6; See also Thomas M Franck, *Comparative Constitutional Process* (FA Praeger 1968) 22 ('To debate whether revolution is unconstitutional is pointless sophistry and only a political, not a legal answer can be given to the more sensitive question whether a revolution must necessarily number among its casualties the normative concept of the rule of law'); Heather A Wilson, *International Law and the Use of Force by National Liberation Movements* (Clarendon Press 1988) 23 ('Although this [revolution] is sometimes characterised as a "right", it can more accurately be described as passive ignorance of actions considered to be beyond the bounds of the law. There is no right of revolution and there is no prohibition of revolution as revolution itself has not been part of international law'); Jean Salmon, 'Internal Aspects of the Right to Self-Determination' in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff 1993) 264.

⁹⁷ Zakaria Dabone, 'International Law: Armed Groups in a State-Centric System' (2011) 93 Int'l Rev Red Cross 395, 399-400.

⁹⁸ HLA Hart, *Concept of Law* (OUP 1961) 117-19.

⁹⁹ Vidya Kumar, 'International Law, Kelsen and the Aberrant Revolution: Excavating the Politics and Practices of Revolutionary Legality in Rhodesia and Beyond' in Nikolas M Rajkovic, Tanja E Aalberts and Thomas Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and Their Politics* (CUP 2016) 158.

¹⁰⁰ Fred Halliday, '"The Sixth Great Power": On the Study of Revolution and International Relations' (1990) 16 Rev Int'l Stud 207, 207-08.

until today.¹⁰¹ Another achievement of the French revolution is the recognition of peoples as subjects of international law by laying foundation to the modern conception of the principle of self-determination. As a violent rebellion against aristocratic privileges, the French revolution, and subsequently the American one, introduced the notion of accountability of the rulers to their peoples, that is the shift from dynastically legitimated monarchical sovereignty to popularly legitimated national sovereignty.¹⁰² This idea was subsequently taken up by the European revolutionaries in 1848 in their fight against feudal structures. Albeit the self-determination proclaimed by the revolutions was conceptually limited with respect to the contemporary understanding of the principle (it was neither applied to colonies and minorities, nor did it envisage democratic practices within states), revolution's impact on the development of the modern conception of self-determination remains undeniable.¹⁰³ The logical consequences of the principles of state sovereignty and self-determination is the prohibition of interference in internal affairs of states. Whilst this principle had been recognised before the French revolution, the latter gave rational foundation and a new logic thereto. It remains one of the fundamental postulates of international relations. Other basic ideas born or reinvigorated by the French revolution and transcending the extant international law include the prohibition of the war of aggression, the principle of humanitarian intervention, the prohibition of slavery and certain principles related to the conduct of war.¹⁰⁴ The major legacy of the American revolution is the idea of the rule of law embodied in the written constitution as a limit on governmental powers available for all to see and understand. This significantly enriched the conception of political legitimacy.¹⁰⁵ The 1917 October revolution was not less significant in its impact.¹⁰⁶ It introduced new dimensions to the principle of self-determination of peoples, including the right of colonial and oppressed peoples to claim independence. Moreover, the principle broadened to include the interests of minorities to determine their political destiny.¹⁰⁷ The Bolshevik

¹⁰¹ Antonio Cassese, 'The Diffusion of Revolutionary Ideas and the Evolution of International Law' in Paola Gaeta and Salvatore Zappala (eds), *The Human Dimension of International Law* (OUP 2008) 73-74.

¹⁰² Mlada Bukovansky, *Legitimacy and Power Politics: The American and French Revolutions in International Political Culture* (Princeton UP 2010) 1.

¹⁰³ Antonio Cassese, 'The Diffusion of Revolutionary Ideas and the Evolution of International Law' in Paola Gaeta and Salvatore Zappala (eds), *The Human Dimension of International Law* (OUP 2008) 75-76.

¹⁰⁴ *ibid* 78-83.

¹⁰⁵ Mlada Bukovansky, *Legitimacy and Power Politics: The American and French Revolutions in International Political Culture* (Princeton UP 2010) 216.

¹⁰⁶ On the impact of the 1917 revolution on international law, see Peter A Steiniger, *Oktoberrevolution und Völkerrecht, eine populärwissenschaftliche Studie* (Staatsverlag der DDR 1967); Alexandr W Uschakow 'Völkerrechtliche Aspekte der Gründung der USSR' (1972) Soviet YBIL 11; Grigory I Tunkin, *Theory of International Law* (William E Butler tr, Harvard UP 1974) 3-20; Herbert Kröger (ed), *Völkerrecht, Lehrbuch*, vol 1 (Staatsverlag 1981) 86-93.

¹⁰⁷ Antonio Cassese, 'The Diffusion of Revolutionary Ideas and the Evolution of International Law' in Paola Gaeta and Salvatore Zappala (eds), *The Human Dimension of International Law* (OUP 2008) 92-93.

revolution also reaffirmed the principle of sovereign equality of states introduced by the French revolution. Whilst political and military considerations at that time hampered the full-fledged integration of the principle in positive international law, it served as an inspiration for developing countries gaining independence in the 1950-60s to take an affirmative duty-based stance against the former colonisers.

Apart from directly affecting the development of international law, the men of the Revolution advanced a myriad of principles which produced effects in the long term, when favourable historic circumstances arose. One of these is the notion of international community. The idea that every people on Earth constitutes a whole, that citizen of every state is also a world citizen belonging to the unity of mankind irrespective of race, religion, language and customs was picked up and advanced by the French revolutionaries. Albeit this notion was dormant for many years thereafter, it gained new impetus in the recent scholarship.¹⁰⁸ Another concept that featured in the declarations of numerous French revolutionaries is that of international solidarity, encompassing the values of social justice and equality, goodwill among people and nations and integrity of the international community. Similarly to the concept of international community, the principle of solidarity was left inert for years. Yet, with the growth of globalisation and interdependence between states, it acquired new forms and is now a constitutive part of the international obligation of cooperation.¹⁰⁹ It is also worth mentioning such revolution-inspired ideas as respect for human rights and democratic legitimacy. Albeit not directly born by the revolution, these principles found support in the revolutionary documents and gained universal recognition.¹¹⁰ All in all, the contemporary value orientation of international law and its increasing humanisation and constitutionalisation are largely due to the impact of the grand revolutions in the formative phases of the modern international law. These values include human rights, self-determination, solidarity, equality and democratic legitimacy. The 21-century revolutions, such as the Arab Spring and the Euromaidan revolution, enriched, or more precisely, gave new force, to the value of democratic legitimacy in the international community. The net impact of these events is yet to be seen. All in all, it is clear from the aforementioned that international law is deeply indebted to revolutions.

Moreover, the view on revolution as abnormality is particularly disturbing if one considers that international law has long ago embraced the doctrine of revolutionary legality developed by Hans Kelsen as part of his general theory of law, which he called 'a pure theory of law'. Kelsen observed that revolution becomes validated by the sheer reality of its success and effectiveness by changing the basic norm (*Grundnorm*) of the legal order:

¹⁰⁸ *ibid* 86-87.

¹⁰⁹ *ibid* 87.

¹¹⁰ *ibid* 88-90. See also Stephen P Marks, 'From the "Single Confused Page" to the "Decalogue for Six Billion Persons": The Roots of the Universal Declaration of Human Rights in the French Revolution' (1998) 20 HRQ 459.

If [revolution] [...] succeed[s], if the old order ceases and the new order begins to be efficacious because the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered a valid order. It is now according to this new order that the actual behaviour of individuals is interpreted as legal or illegal [...] If the revolutionaries fail, if the order they have tried to abolish remains efficacious, then, on the other hand their undertaking is interpreted, not as legal, a law-creating act, as the establishment of a constitution, but as an illegal act, as the crime of treason, and this according to the old [...] constitution and its specific basic form.¹¹¹

It follows that the theoretical focus for resolving the issue of validity of the revolutionary government is on efficacy — the power and capability of the new regime to enforce its laws and secure obedience. In other words, a legal order is an effective order. Importantly, both the means through which revolution is effectuated as well as the cause of revolution are irrelevant to the determination of revolutionary legality. This doctrine has been applied by numerous national and international courts.¹¹² In *Madzimbamuto v Lardner-Burke* (1966) and *Baron v Ayre* (1966) — what have been dubbed as *Grundnorm* cases because of the central role that Kelsen's doctrine of revolutionary legality played in them — two detainees, Madzimbamuto and Baron, challenged the renewal of their detention under the new 1965 constitution established by the revolutionary Rhodesian government as being illegal because carried out by the authority having no legal existence. The court concluded that in order to determine the legality of the revolutionary regime and its constitution, the recourse should be made to the doctrine of revolutionary legality. It was asserted that not only is this a doctrine of international law but it is 'a statement of the obvious proposition that what is destroyed no longer exists'.¹¹³ It was further stated that:

¹¹¹ Hans Kelsen, *General Theory of Law and State* (Harvard UP 1945) 118. See also Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 208-10.

¹¹² See eg *State v Dosso* [1958] PLD SC 533 (SC, Pakistan); *Uganda v Commissioner of Prisons* [1966] EA 514 (HC, Uganda); *Madzimbambuto v Lardner-Burke NO*, *Baron v Ayre NO* (1966) (4) SA 462 (Gen Div Rhodesia HC); *Prasad v Republic of Fiji* [2001] NZAR 21 (HC, Fiji); *Republic of Fiji v Prasad* [2001] NZAR 385 (Court of Appeal, Fiji); *Qarase v Bainimarama* [2009] FJCA 9 (Court of Appeal, Fiji). For a full list of decisions applying Kelsen's doctrine of revolutionary legality to revolutionary events, see Vidya Kumar, 'International Law, Kelsen and the Aberrant Revolution: Excavating the Politics and Practices of Revolutionary Legality in Rhodesia and Beyond' in Nikolas M Rajkovic, Tanja E Aalberts and Thomas Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and Their Politics* (CUP 2016) 160, fn 19.

¹¹³ Goldin J (General Division) 89-90 cited in Vidya Kumar, 'International Law, Kelsen and the Aberrant Revolution: Excavating the Politics and Practices of Revolutionary Legality in Rhodesia and Beyond' in Nikolas M Rajkovic, Tanja E Aalberts and Thomas Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and Their Politics* (CUP 2016) 171.

It may be accepted that a successful revolution which succeeds in replacing the old Grundnorm (or fundamental law) with a new one establishes the revolutionaries as a new lawful government [...] If in the instant case the stage is reached when it can be said with reasonable certainty that the revolution has succeeded, then in the eyes of international law Rhodesia will have become a de jure independent sovereign state, its 'Grundnorm' will have changed and its new constitution will have become the lawful constitution. There is ample authority for this proposition [...] See for example Kelsen General Theory of Law and State at p. 118.¹¹⁴

The court eventually held that the Rhodesian revolution regime was not firmly established as Britain was still regarded as 'rival sovereign' and, thus, revolution was unsuccessful; the detention orders were recognised as *ultra vires* and of no legal force.¹¹⁵ Thus, even though Kelsen's doctrine was accepted as the appropriate test to determine the validity of revolutionary regime, it was found to be inapplicable to colonial entities. Two years later this conclusion was revisited in *R v Ndhlovu*.¹¹⁶ The Rhodesian Court of Appeal concluded that the Rhodesian Revolution was now successful as it has passed the Kelsenian test: a new basic norm was established and the old legal order ceased to exist.¹¹⁷ This was based on a conclusion that the British government would not succeed in regaining control and that 'the 1961 Constitution has been annulled by the efficacy of the change'.¹¹⁸ Apart from the practice of endorsement of Kelsen's doctrine by domestic courts, a famous international decision, the *Tinoco* case, likewise astutely reflects this effectiveness-based approach:

To hold that a government which establishes itself and maintains a peaceful administration, with the acquiescence of the people for a substantial period of time, does not become a de facto government unless it conforms to a previous constitution would be to hold that within the rules of international law a revolution contrary to the fundamental law of the existing government cannot establish a new government. This cannot be, and is not, true.¹¹⁹

The significance of these judgments is hard to oversee. Taken together, they manifest 'an extraordinary judicial consensus on one point: Kelsen's test of revolutionary legality was endorsed as the legally correct way to determine the

¹¹⁴ Beadle CJ (Court of Appeal) 33 cited in Vidya Kumar, 'International Law, Kelsen and the Aberrant Revolution: Excavating the Politics and Practices of Revolutionary Legality in Rhodesia and Beyond' in Nikolas M Rajkovic, Tanja E Aalberts and Thomas Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and Their Politics* (CUP 2016) 173.

¹¹⁵ Beadle CJ (Court of Appeal) 46-47, 88-89.

¹¹⁶ *R v Ndhlovu* [1968] (4) SA 515.

¹¹⁷ *ibid* 24-25, 34-36, 48-50.

¹¹⁸ *ibid* 532, C.

¹¹⁹ *Great Britain v Costa Rica* (1923) 1 RIAA 369, 375.

lawfulness of a revolution'.¹²⁰ Importantly, the substance, merits and goals of revolution were considered as irrelevant for its legality. This is particularly striking in the case of Rhodesia where the Smith's revolutionary government was recognised as legal irrespective of its international condemnation as an 'illegal racist regime'.¹²¹ Despite the numerous scholarly contestations of the validity of the doctrine,¹²² it remains the dominant position within international legal circles that effectiveness of the government determines its legality. This is well reflected in the Montevideo Convention, which provides that in order for a state to be recognised as possessing legal personality under international law it should meet the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.¹²³

Yet, a more recent practice of states and UN organs illustrates that the principle of effectiveness is no longer *the* one governing the law of statehood and governmental legitimacy. Other legality-based criteria are increasingly acquiring importance. These are often formulated in negative terms and require that a state is not created in pursuance of racist policies, as a result of the illegal use of force and in violation of the principles of self-determination and democracy. The failure to consider other relevant legal principles is but one bone of contestation that Kelsen's doctrine of revolutionary legality has attracted. On this view, the doctrine 'cannot form the basis of a truly legal decision' because it is solely based on the principle of effectiveness which is not sufficient on its own to evaluate legitimacy.¹²⁴ A related criticism is voiced by the representatives of a 'democratic revolution theory'. For them, the legality of revolution is to be determined not by its success but its adherence

¹²⁰ Vidya Kumar, 'International Law, Kelsen and the Aberrant Revolution: Excavating the Politics and Practices of Revolutionary Legality in Rhodesia and Beyond' in Nikolas M Rajkovic, Tanja E Aalberts and Thomas Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and Their Politics* (CUP 2016) 176. Kelsen's doctrine has been repeatedly designated as a doctrine of international law by both courts and legal scholars. It forms a part of the increasing role played by national courts in the formation and development of international law. See eg Lord Bingham, 'Foreword' in Shaheed Fatima (ed), *Using International Law in Domestic Courts* (Hart Publishing 2005); Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *Int'l & Comp LQ* 57.

¹²¹ UNSC Res 202 (6 May 1965) UN Doc S/RES/202; UNSC Res 216 (12 November 1965) UN Doc S/RES/216; UNSC Res 217 (20 November 1965) UN Doc S/RES/217; UNSC Res 221 (9 April 1966) UN Doc S/RES/221; UNSC Res 232 (16 December 1966) UN Doc S/RES/232.

¹²² For a detailed discussion of the academic response to Kelsen's doctrine of revolutionary legality, see Vidya Kumar, 'International Law, Kelsen and the Aberrant Revolution: Excavating the Politics and Practices of Revolutionary Legality in Rhodesia and Beyond' in Nikolas M Rajkovic, Tanja E Aalberts and Thomas Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and Their Politics* (CUP 2016) 177-83.

¹²³ Montevideo Convention on Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 *LNTS* 19, art 1.

¹²⁴ John M Eekelaar, 'Principles of Revolutionary Legality' in Alfred WB Simpson (ed), *Oxford Essays in Jurisprudence* (Clarendon Press 1973) 23, 39-40.

to democratic principles.¹²⁵ The pertinence of other principles in ascertaining revolutionary legality has already been manifested with respect to the twenty-first-century democratically inspired revolutions, such as the 2010-12 ‘Arab Spring’ and the 2013-14 Euromaidan revolution, which attracted international support not because they were successful, indeed most of them were not, but because they pursued legitimate cause, such as eradication of tyranny and installation of democracy. These events undoubtedly reinvigorated scholarly interest to redefine the nexus between revolutions and international law.¹²⁶ Yet, much of what has been written on the topic so far is limited in context, nature and scope and the concept of revolution remains largely under-theorised.¹²⁷ Moreover, on a philosophical level, the advancement of democracy as a human right and the corollary need to protect and restore it whenever it is in danger inevitably entails the investigation of the concept of revolution from a wholly new angle, that is as a last remedy against antidemocratic usurpers.

That said, there are five grounds to claim legality of revolution in international law: revolution as a human right, revolution as a self-defence, revolution as a general principle of law, revolution as a legitimate belligerency and revolution as a legal remedy. This thesis asserts that neither stands scrutiny on its own, particularly considering the fact that there is no watertight separation between the five aforementioned justifications. Each of them implies the second-order character of revolution, namely its remedial function. Thus, the right to revolution can be at best characterised as a right *sui generis* by virtue of its auxiliary nature. Since it does not protect inherent objective value, such as life, equality, physical integrity etc., akin to conventional human rights, but serves to maximise protection for these other rights, it cannot be regarded as a human right in and of itself. It is a second-order right aimed to secure other (more conventional) rights and to fill a gap when traditional remedies are not available. Because the concept of a right *sui generis* does not fit comfortably within the traditional binary approach to international law, under which the norm is either legal or is disregarded as non-law, the recourse will be had to the formula of ‘illegal but justifiable’ action — a product of the

¹²⁵ See eg Richard Albert, ‘Democratic Revolutions’ (2011) <https://www.researchgate.net/publication/228284070_Democratic_Revolutions> accessed 8 March 2016; Ozan O Varol, ‘The Democratic Coup d’État’ (2012) 53 Harv ILJ 322; Kalkidan Obse, ‘The Arab Spring and the Question of Legality of Democratic Revolution in Theory and Practice: A Perspective Based on the African Union Normative Framework’ (2014) 27 LJIL 817.
¹²⁶ See eg Owen Taylor, ‘Reclaiming Revolution’ (2011) 22 FYBIL 259; Peter J Schraeder, ‘Tunisia’s Jasmine Revolution, International Intervention and Popular Sovereignty’ (2012) 13 Whitehead J Dipl & Int’l Rel 75; Jordan J Paust, ‘International Law, Dignity, Democracy, and the Arab Spring’ (2013) 46 Cornell Int’l LJ 1; Rosa Brooks, ‘Lessons for International Law from the Arab Spring’ (2012-2013) 28 Am U Int’l L Rev 713; Carlo Panara and Gary Wilson (eds), *The Arab Spring: New Patterns for Democracy and International Law* (Martinus Nijhoff 2013); Myroslava M Antonovych and others, *Українська Революція гідності, агресія РФ і міжнародне право: Монографія* (Ukrainska Asotsiatsiya Mizhnarodnogo Prava 2014).

¹²⁷ Vidya Kumar, ‘International Law, Kelsen and the Aberrant Revolution: Excavating the Politics and Practices of Revolutionary Legality in Rhodesia and Beyond’ in Nikolas M Rajkovic, Tanja E Aalberts and Thomas Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and Their Politics* (CUP 2016) 158.

progressive march of the substantive legitimacy talk in international law — to clarify revolution's exceptional second-order status. The more detailed exposition of these issues is provided in the subsequent sections.

6.3.1. Revolution as a Human Right

As section 6.2 has shown, at various points of human history, the recognition of the right to resist has been accepted as vital for maintaining a balanced social organisation. Throughout the eighteenth and the twentieth centuries, explicit legal recognition of the right was considered undebatable. It was even proclaimed as the 'supreme' human right by one of the most distinguished legal scholars.¹²⁸ However, in the twenty-first century, the general status of the right of revolution within the framework of international human rights law is at best precarious. This section will reconsider this claim.

It is increasingly admitted that a so-called 'right to revolution' constitutes an inherent part of international human rights law and particularly the right to democracy: it constraints future government abuse, empowers citizens and acts as 'an insurance policy against undemocratic backsliding'.¹²⁹ Indeed, this right cannot be claimed in abstract but only when fundamental human rights are violated by an oppressive government and all peaceful means to resolve the issue have been exhausted. It follows that the right of revolution is a secondary (derivative) rather than primary right: rather than to serve as a substantive limit on state authority, it can only be invoked when a grave wrong has been committed. Its goal is to provide a remedy against serious human rights violations rather than to secure a specific objective value. Thus, international human rights law constitutes a primary legal framework from which the right of revolution springs. It is important to note, however, that the very second-order nature of the right of revolution makes it natural, inherent and independent of the recognition in positive law. It exists by virtue of possessing human rights and rests on the notions of human dignity and autonomy. It is, hence, fair to suggest that human rights instruments can only be used as declaratory of this right rather than its source.¹³⁰ This notwithstanding, clarifying *legal* basis of revolution is essential if it is to be used in support of a particular legal argument — in the present case, the democratic entitlement thesis.

¹²⁸ Hersch Lauterpacht, *International Law and Human Rights* (Stevens and Sons Ltd 1950) 116.

¹²⁹ Tom Ginsburg, Daniel Lansberg-Rodriguez and Mila Versteeg, 'When to Overthrow Your Government: The Right to Resist in the World's Constitutions' (2013) 60 UCLA L Rev 1184, 1184.

¹³⁰ *ibid* 1194. See also Heiner Bielefeld, 'The Right to Resist' in Wilhelm Heitmeyer and John Hagan (eds), *International Handbook of Violence Research* (Springer 2003) 1103 (Claiming that the inclusion of the right to resist in positive law is not concerned with the legalization of the right at stake but rather 'with the formal strengthening of the right to resist, whose existence is already postulated, and defining more precisely the conditions under which it can be exercised').

Having said that, the positive foundations of the right of revolution can be derived from the UDHR, which characterises the lack of protection of human rights as a circumstance justifying rebellion: '[I]t is essential if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'.¹³¹ While it is not entirely clear from the wording that the Declaration recognises the right of revolution, Sumida provocatively asserted that the right in question can be derived from the Declaration as its preamble reflects the growing acceptance of this right from the time of the American Declaration of Independence, an acceptance so pervasive that allowed the writer to conclude that 'the right of a people to revolt against tyranny is now a recognized principle of international law'.¹³² Likewise, Paust, using the preamble language of the UDHR as an inspiration, asserted that '[t]oday, the right of revolution is an important international precept and a part of available strategies for the assurance both of the authority of the people as the lawful basis of any government and of the process of national self-determination'.¹³³ However, those claiming that the right of revolution cannot be read into the text of the Declaration can be equally forgiven. On this view, the preamble of the Declaration merely assumes resistance as a possible outcome of rights violations without affirming any legal right to resist.¹³⁴ This view seems to better reflect the realities of the ideological East-West rivalry when the Declaration was adopted as an 'agreement to disagree' rather than a catalogue of enforceable human rights. Furthermore, one should not discount a persistent lack of consensus as to the explicit inclusion of the provision on resistance into the text of the Declaration evidenced in the preparatory works.¹³⁵ The positioning of revolution in the preambular text was a political compromise, which *a priori* implies its non-right nature. Thus, the preamble of the UDHR cannot in and of itself serve as a positive source of the right of revolution, albeit it lends important intellectual support for such a claim.

The right of revolution can also be implied from article 21 of the Declaration, which reflects the theory of government as propagated by the Enlightenment philosophers: 'The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections, which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures'. It is fair to suggest that if these normal procedures for replacing government are abridged people should

¹³¹ Universal Declaration of Human Rights, UNGA Res 217(III)A (10 December 1948) preamble.

¹³² Gerald Sumida, 'The Right of Revolution: Implications for International Law and Order' in Charles A Barker (ed), *Power and Law: American Dilemma in World Affairs* (The John Hopkins Press 1971) 130, 134.

¹³³ Jordan J Paust, 'The Human Right to Participate in Armed Revolution and Related Forms of Social Violence: Testing the Limits of Permissibility' (1983) 32 Emory LJ 545, 562.

¹³⁴ Johannes Morsink, 'The Philosophy of the Universal Declaration' (1984) 6 HRQ 309, 325.

¹³⁵ See eg Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press 2000) 309ff.

be able to avail themselves of the right of revolution.¹³⁶ On this account, revolution is an ultimate form of political participation.¹³⁷ This idea finds support in the drafting history of the article. During the *travaux préparatoires*, there were several proposals (especially from Chile and Cuba) to either amend article 21 by the inclusion of the provision explicitly acknowledging the right to revolt against oppressive government or to include a separate article on the matter. However, the delegates from the USA, the United Kingdom, Belgium and Austria objected to the inclusion of the right to rebel into the substantive text of the Declaration because, as Roosevelt explained, ‘it would be unwise to legalize the right to rebellion, lest the formula should be invoked by subversive groups wishing to attack or undermine genuinely democratic Government. Honest rebellion against tyranny was permitted by the Declaration. Subversive action was quite a different matter’.¹³⁸ In the end, a carefully crafted provision on the right to resist tyranny was included in the preamble. Thus, the drafting history of both article 21 and the preamble reveals that whilst the choice of the right terminology was a matter of debate, disagreement and even confrontation, the majority of the delegates agreed in principle on the existence of the right to rebel. This notwithstanding, a strong opposing view is that the textual interpretation of the Declaration implies that ‘the will of the people’ can only be expressed in elections.¹³⁹ It is in order to remind the reader that although the UDHR is not strictly speaking binding, it is widely perceived by the international community as an authoritative interpretation of the human rights provisions of the UN Charter. Consequently, even though the idea of violent resistance to tyranny and oppression can be implied from the Declaration, the latter does not explicitly recognise revolution as a human right.

Another relevant legal instrument for the right of revolution is the ICCPR. It declares in its article 2(3)(a) that each State Party undertakes ‘to ensure that any person whose rights to freedoms as herein recognized are violated shall have an effective remedy’.¹⁴⁰ Importantly, what constitutes an effective remedy under the ICCPR is apparently not limited to legal or judicial remedies,¹⁴¹ and other tools, including forceful measures by non-state actors, are not explicitly prohibited. It means that people’s self-defensive action as a means to remedy human rights violations cannot be excluded. In addition, the UN Human Rights Committee has been careful to point out that the prohibitions on propaganda

¹³⁶ *ibid* 308.

¹³⁷ Peter R Baehr, ‘Democracy and Right to Participation’ in David P Forsythe (ed), *Encyclopedia of Human Rights* (OUP 2009) 49.

¹³⁸ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press 2000) 763.

¹³⁹ Kalkidan Obse, ‘The Arab Spring and the Question of Legality of Democratic Revolution in Theory and Practice: A Perspective Based on the African Union Normative Framework’ (2014) 27 LJIL 817, 824.

¹⁴⁰ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 2(3)(a).

¹⁴¹ UNHRC ‘General Comment 31: Article 2 (Implementation at National Level)’ (1981) UN Doc HRI/GEN/1/Rev.9, para 1.

for war ‘do not prohibit advocacy of the sovereign right of self-defense or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations’.¹⁴²

Furthermore, article 1 ICCPR states that ‘[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’. A right of revolution is a necessary concomitant of national self-determination. On one view, the right to self-determination incorporates only one aspect of the right of revolution, namely resistance against colonial domination, alien occupation and racist regimes. However, as the argument proceeds, the right of self-determination does not encompass other situations involving subjugated and oppressed nations.¹⁴³ This conclusion finds support in the 1970 UN Declaration on Principles of International Law that explicitly warned against the use of the principle as an authorisation of ‘action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States’.¹⁴⁴ This does not, however, prevent some scholars from advancing theories of constructive ambiguity — the deliberate use of ambiguous language with respect to a sensitive issue to advance some political purpose — in order to claim that the right of self-determination includes a latent right to revolution.¹⁴⁵ On this view, article 1 ICCPR read in conjunction with article 25 on the right to political participation and article 2(3)(a) on the right to an effective remedy of the Covenant, combined with the lack of an explicit prohibition on resistance, implies the right of revolution.

To push this claim further, whilst secession embodies the most extreme display of external self-determination, revolution represents the most radical

¹⁴² UNHRC ‘General Comment 11: Article 20 (Prohibition of Propaganda for War)’ (1983) UN Doc HRI/GEN/1/Rev.9, para 2.

¹⁴³ Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal* (CUP 1995) 167 (‘Liberation movements which cannot be classified among those fighting for freedom from colonialism, foreign occupation, or racism — the three situations covered by the principle of self-determination — are not entitled to international status’); Aleksandr Marsavelski, ‘The Crime of Terrorism and the Right of Revolution in International Law’ (2013) 28 Conn J Int’l L 241, 247; Kalkidan Obse, ‘The Arab Spring and the Question of Legality of Democratic Revolution in Theory and Practice: A Perspective Based on the African Union Normative Framework’ (2014) 27 LJIL 817, 824.

¹⁴⁴ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970).

¹⁴⁵ See Manfred Nowak, *UN Covenant on Civil and Political Rights — CCPR Commentary* (NP Engel Publishers 1993) 23, 34; Allan Rosas, ‘Article 21’ in Gudmundur Alfredsson and Asbjorn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff 1999) 432-42, 449-51. See also Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol 1 (3rd edn, OUP 2012) 332 (‘The right of self-determination supports in its essence any people fighting in its majority for democratic institutions of government [...] In a sense, it is coming back to its roots as a principle in support of revolutionary change’).

execution of internal self-determination.¹⁴⁶ The two rights are very close as both stem from gross violations of human rights and allow for the use of force to displace the sitting government or secede from the state concerned. Along these lines, the most sophisticated argument in favour of the right to resist was advanced by Honore who turned the language of the 1970 Declaration on its head by suggesting that whilst the wording of the Declaration is aversive to the dismemberment of states it is only so when the latter respect the principle of self-determination. Should states act contrary to their people's aspirations, they forfeit their right to (internal) sovereignty and territorial integrity in that 'group which forms a unit of self-determination can resort to force to make good their right'.¹⁴⁷ To put it differently, the people, in the words of Honore, can exercise their right of self-determination by means of armed rebellion. Honore's interpretation seems to fit well within certain provisions of the Declaration, such as, e.g., '[i]n their actions against, and resistance to, such forcible action [which deprives peoples of their right to self-determination] in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter'.¹⁴⁸ Despite the sophisticated reasoning and compelling logic behind such claim, reading the right to revolution into the ICCPR is far from controversial. Opposing views abound¹⁴⁹ and, most importantly, this claim has never been judicially tested and may or may not hold up to scrutiny. The same holds true for other major human rights conventions as they neither codify nor prohibit the right to revolt. As Murphy has put it, '[f]or now, the International Bill of Human Rights remains at best a source of *lacunae* in the law on the right to resist'.¹⁵⁰

One can also briefly mention another context where the right to resistance is widely acknowledged, that is the right to resist genocide.¹⁵¹ Whilst scholars

¹⁴⁶ Jasmine Nahlawi, 'Self-Determination and the Right to Revolution: Syria' (2014) 8 HR & ILD 84, 91. See also Stefan Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People' (2013) 12 Chinese JIL 219, 236.

¹⁴⁷ Tony Honore, 'Right to Rebel' (1988) 8 Oxford J Leg Stud 34, 44.

¹⁴⁸ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970).

¹⁴⁹ Robert E Gorelick, 'Wars of National Liberation: *Jus Ad Bellum*' (1979) 11 Case W Res J Int'l L 71, 71 (Arguing that irrespective of the wide recognition of a right to self-determination, 'the question as to the appropriate means to that end remains largely unresolved'); Marc J Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Martinus Nijhoff 1987) 24, 32; Mustafa Şahin, 'The Use of Force in Relation to Self-Determination in International Law' (1999) 1 Foreign Pol 26, 34 (Contending that the 1970 Declaration does not refer to resistance as 'armed resistance').

¹⁵⁰ Shannonbrooke Murphy, 'The Right to Resist Reconsidered' in David Keane and Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar 2012) 99 (emphasis original).

¹⁵¹ See Christian Tomuschat, 'The Right of Resistance and Human Rights' in UNESCO, *Violations of Human Rights: Possible Rights of Recourse and Forms of Resistance* (Imprimerie des Press Universitaires de France 1984) 22, 29; David B Kopel, Paul Gallant and Joanne D Eisen, 'Is Resisting Genocide a Human Right?' (2005) 81 Notre Dame L Rev 1275; Frederic Megret,

are more or less unanimous on the right to resort to violence against the government consistently practicing genocidal policies on a wide scale, it is clear that this situation is of a limited importance for the general right to revolution, since not all authoritarian governments that deny their people even a minimum possibility to partake in the political process commit genocide.

Meanwhile, regional human rights instruments display divergent approaches. Whereas the European and Inter-American systems do not only fail to accord the right of resistance legal recognition but even implicitly disavowal it,¹⁵² the African Charter on Human and Peoples' Rights codifies it in an express provision. In article 20(2) it proclaims: 'Colonized or *oppressed* peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community'.¹⁵³ It is the adjective 'oppressed' that caused so much ambiguity as to the whole scope and meaning of article 20(2). According to the restrictive interpretation, the right to resist oppression is only to be exercised against colonial or racist regimes. On this understanding, oppressed people are solely those under colonial or racial domination. A more liberal interpretation, however, implies extending the scope of oppression to despotism, dictatorship or hegemony. On this view, the qualifier 'oppressed' was intentionally used to ensure that the article is not obsolete in a contemporary post-colonial Africa. According to this position, article 20(2) recognises a people's right to rebellion.¹⁵⁴ However, such interpretation seemingly stands in a stark contradiction with article 23(3) of the African Charter on Democracy, Elections and Governance, which holds that '[a]ny replacement of a democratically elected government by armed dissidents or rebels' constitutes an unconstitutional change of government and shall be sanctioned by the AU appropriately.¹⁵⁵ Be this as it may, article 23(3) refers to illegal replacement of a democratically elected government and it is still unclear whether authoritarian government, which came to power by coup, or the democratically constituted government, which eventually developed

'Not "Lambs to the Slaughter": A Programme for Resistance to "Genocidal Law"' in Rene Provost and Payam Akhavan (eds), *Confronting Genocide* (Springer Verlag 2011).

¹⁵² Eg the fact that article 2(2)(c) ECHR sanctions recourse to lethal force where 'absolutely necessary' to quell a riot or insurrection, and article 15 ACHR provides that the right of peaceful assembly shall be exercised 'without arms' implies the 'latent disavowal' of the right to resistance. See Shannonbrooke Murphy, 'The Right to Resist Reconsidered' in David Keane and Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar 2012) 100.

¹⁵³ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (ACHPR) art 20(2) (emphasis added).

¹⁵⁴ See Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights* (Martinus Nijhoff 2003) 263-66; Shannonbrooke Murphy, 'Unique in International Human Rights Law: Article 20 (2) and the Right to Resist in the African Charter on Human and Peoples' Rights' (2011) 11 AHRLJ 465, 474. See also Edem Kodjo, 'The African Charter on Human and Peoples' Rights' (1990) 11 HRLJ 271, 272-74, 281-82.

¹⁵⁵ African Charter on Democracy, Elections and Governance (adopted 30 January 2007, entered into force 15 February 2012) AU Doc Assembly/AU/Dec.147(VIII) art 23(3).

into autocracy, enjoy the same protection.¹⁵⁶ Moreover the concept of ‘armed dissidents or rebels’ is not co-terminus with mass protests and popular uprisings that spark revolution. It seems, thus, that the underlying purpose of the article concerned is the protection of democratic regimes from the threat of forcible removal by the military or armed groups and does not cover the ouster *en masse* of unelected or unaccountable regimes. *Ergo*, revolutions do not seem to constitute unconstitutional changes of government under the AU standards.

Another explicit provision on the right of rebellion can be found in the Revised Arab Charter on Human Rights, which asserts that ‘[a]ll peoples have the right to resist foreign oppression’.¹⁵⁷ While it is more restrictively formulated it is also unqualified.¹⁵⁸ Further, the Universal Islamic Declaration of Human Rights states that ‘[e]very individual and even people has the inalienable right to freedom [...] and shall be entitled to struggle by all available means against any infringement or abrogation of this right; and every oppressed individual or people has a legitimate claim to the support of other individuals and/or peoples in such a struggle’.¹⁵⁹ It is clear from the wording of the text of the Declaration that the right of revolution is explicitly envisaged.

However, reading the right to revolution into the existing human rights framework is contestable on both normative and conceptual grounds. Firstly, apart from article 20(2) ACHPR and article 2(4) of the Arab Charter, no international treaty contains an express provision on the right of revolution. This creates an aura of ambivalence rather than signifies either acceptance or rejection of the right in question, at least at this point. Further, the above arguments have not been tested at the World Court or any other international tribunal, and consequently their credibility cannot be ruled out but neither can it be upheld. One should also consider the fact that there are no correlative duties on affected states to refrain from suppressing or criminalising legitimate

¹⁵⁶ Some scholars claim that the Constitutive Act of the AU solely protects governments characterised by the legitimacy of origin, be they democratic or autocratic in their actual exercise of power. See Djacoba Liva Tehindrazanarivelo, ‘Les sanctions de l’Union africaine contre les coups d’État et autres changements anticonstitutionnels de gouvernement: potentialités et mesures de renforcement’ (2004) 12 Afr YBIL 255, 279 (‘Il semble donc que la définition des actes interdits par l’article 30 de l’Acte constitutif protège la légitimité d’origine des pouvoirs; mais rien n’y indique qu’un changement anticonstitutionnel opéré en réaction à l’illégitimité d’exercice d’un gouvernement ne saurait pas sanctionné sans aucune forme de distinction’).

¹⁵⁷ League of Arab States, Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) 12 IHR Rep 883, art 2(4).

¹⁵⁸ Shannonbrooke Murphy, ‘The Right to Resist Reconsidered’ in David Keane and Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar 2012) 104.

¹⁵⁹ Islamic Council of Europe, Universal Islamic Declaration of Human Rights (19 September 1981) 21 Dhul Qaidah 1401, art II (b).

rebellions,¹⁶⁰ nor obligations on the part of third states to assist those,¹⁶¹ nor even duties on states to secure the non-extradition of rebels for political crimes.¹⁶² Secondly, on a purely theoretical level, to legalise the right to revolution is to recognise the legitimacy of violence. In this sense, the right to rebel is a sort of ‘a right to do wrong’.¹⁶³ It is a right to engage in activities that are undoubtedly unlawful and even criminal under the municipal law of the state against which rebellion is directed. The exercise of the right at stake can lead to human injuries, even death, and unleash havoc to state infrastructure and property. Against this backdrop, Honore astutely maintained, ‘[d]oes it make sense to speak of a *right* to rebel, to which will presumably correspond a duty on the part of the state not to resist the rebellion, and on third parties to help the rebels, or at least not to obstruct them?’¹⁶⁴ The fact that one is ‘at times entitled to use violence against [...] [his] fellow citizens [...] is hard to

¹⁶⁰ Christine Gray, *International Law and the Use of Force* (OUP 2000) 57 (States may seek foreign assistance in suppressing rebellions); James Crawford, ‘The Right of Self-Determination in International Law’ in Philip Alston (ed), *Peoples’ Rights* (OUP 2001) 48–49 (There are no international legal norms prohibiting states from forcibly suppressing rebellions). See also John C Novogrod, ‘Internal Strife, Self-Determination, and World Order’ in Cherif M Bassiouni (ed), *International Terrorism and Political Crimes* (Charles C Thomas 1975) 98, 103; Christine Gray, *International Law and the Use of Force* (OUP 2000) 57 (When a rebellion attains the level of an armed conflict, third states are prohibited from assisting the government); James Crawford, ‘The Right of Self-Determination in International Law’ in Philip Alston (ed), *Peoples’ Rights* (OUP 2001) 41; Wouter G Werner, ‘Self-Determination and Civil War’ (2001) 6 JCSL 171, 190.

¹⁶¹ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 209 (‘The Court therefore finds that no such general right of intervention, in support of an opposition within another State, exists in contemporary international law’); See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Geneva Protocol II) art 3(2) (‘Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs’).

¹⁶² It is a matter of domestic concern of a state to define whether political offenses may constitute exception to extradition. See eg Ivor Stanbrook and Clive Stanbrook, *Extradition: Law and Practice* (2nd edn, OUP 2000) 65. The 1951 Refugee Convention provides that a person is not to be returned to political persecution, not prosecution. Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 33 (Defines persecution as a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a political social group). See also UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (January 1992) UN Doc HCR/IP/4/Eng/REV.1, para 56 (‘Persecution must be distinguished from punishment for a common law offence’).

¹⁶³ The expression was used by Jeremy Waldron, ‘A Right to Do Wrong’ (1981) 92 Ethics 21, 21 (‘[I]f we take the idea of moral rights seriously, we have to countenance the possibility that an individual may have a moral right to do something that is, from the moral point of view, wrong’).

¹⁶⁴ Tony Honore, ‘Right to Rebel’ (1988) 8 Oxford J Leg Stud 34, 36 (original emphasis).

stomach'.¹⁶⁵ It is a vital observation and has been employed by many scholars to deny the existence of a right of revolution.¹⁶⁶ Another conceptual problem with the right to revolution argument relates to its susceptibility to abuse, whereas the language of legitimate resistance is used by various national liberation movements to justify their atrocity crimes, including terrorism. In particular, it is often claimed that 'the right of resistance is justified in asymmetrical conflicts, where one side (usually the state) has overwhelming military superiority. Without access to comparable weapons [...] armed groups are not in a position to take on "military targets" and are obliged to attack softer targets, including civilians'.¹⁶⁷ On this view, the right to revolution lacks any inherent moral content. Ultimately, the right of revolution is often seen as redundant because, as runs the argument, it is today superseded by a right to avail oneself of constitutional procedures before national and international authorities responsible for the protection and safeguarding of human rights,¹⁶⁸ particularly judicial proceedings.¹⁶⁹ It follows that the right to revolution cannot be characterised as a *human* right.

6.3.2. Revolution as a Self-Defence

6.3.2.1. Self-Defence as a General Principle of Law

Any law, international or municipal, which prohibits recourse to force, is necessarily limited by the right of self-defence.¹⁷⁰

Humanity has always recognised that individuals should have the right to defend themselves from violence. When a state's government represents a significant danger to its own people, the latter can resort to force to repeal the danger. Having evolved from 'inherent instinct' to 'natural right' and to 'individual right', the right to self-defence is now, in the words of some

¹⁶⁵ *ibid* 34.

¹⁶⁶ See eg Bertie Duner, 'Rebellion: The Ultimate Human Right?' (2005) 9 Int'l JHR 247, 261ff.

¹⁶⁷ International Council on Human Rights Policy, *Talking about Terrorism — Risks and Choices for Human Rights Organisations* (ATAR Roto Press SA 2008) 25-27. See also Gunter Lewy, 'Resistance to Tyranny: Treason, Right or Duty?' (1960) 13 West Pol Q 581, 588-89.

¹⁶⁸ See eg Tran Van Minh, 'Political and Juridical Sanctions against Violations of Human Rights' in UNESCO, *Violations of Human Rights: Possible Rights of Recourse and Forms of Resistance* (Imprimerie des Press Universities de France 1984); Walter Kälin and Jörn Kunzli, 'Article 1F(b): Freedom Fighters, Terrorists, and the Notion of Serious Non-Political Crimes' (2000) 12 Int'l J Refugee L 46, 51.

¹⁶⁹ Edward Rubin, 'Judicial Review and the Right to Resist' (2008) 97 Geo LJ 61, 87 ('[J]udicial review domesticates the right of revolution or resistance').

¹⁷⁰ *Judgment of the International Military Tribunal for the Far East* (12 November 1948) reprinted in John Pritchard and Sonia M Zaide (eds), *The Tokyo War Crimes Trial*, vol 22 (Garland Publishing 1981) 48/494.

commentators, a fundamental general principle of international law,¹⁷¹ ‘hidden in the shadows of the more prominent right of interstate self-defence’.¹⁷² Some scholars even assert that personal self-defence is now a ‘*véritable droit de l’homme*’,¹⁷³ a ‘fundamental human right’,¹⁷⁴ a ‘well-established human right under international law’,¹⁷⁵ an ‘international human right’¹⁷⁶ or even a ‘non-derogable human right’.¹⁷⁷ Yet, this view is not widely supported¹⁷⁸ and no international treaty explicitly recognises the right. *Ergo*, it can be submitted that the right to personal self-defence is not a human right, but an individual *sui generis* right (rooted in natural law) since it is distinct from human rights in its historical, social and political functions. Unlike human rights, which emerged in response to unchecked state power and abuse and are primarily directed against the state, the right to self-defence is a pre-societal right that evolved in the absence of the state and is directed against any unlawful attacker.¹⁷⁹ It finds its analogy in criminal law’s concept of personal self-defence, according to which a person may be stripped of criminal responsibility for violent acts committed in self-defence.

The right to personal self-defence operates on three levels: the state-to-individual level, the individual-to-individual level and the individual-to-state level.¹⁸⁰ It is the third dimension of this right which is of interest here, namely the right of individuals and peoples to forcibly resist certain types of human

¹⁷¹ Bodo Missling, *Widerstand und Menschenrechte: Das völkerrechtlich begründete Individualwiderstandsrecht gegen Menschenrechtsverletzungen* (Medien Verlag Köhler 1999) 145; David Kopel, Paul Gallant and Joanne D Eisen, ‘The Human Right of Self-Defense’ (2007) 22 *BYU JPL* 43, 58; Peter Haggenmacher, ‘Self-Defence as a General Principle of Law’ in Arthur Eyffinger, Alan Stephens and Sam Muller (eds), *Self-Defence as a Fundamental Principle* (TMC Asser Press 2009) 3; Jan Arno Hessbruegge, *Human Rights and Personal Self-Defence in International Law* (OUP 2017) 3.

¹⁷² Jan Arno Hessbruegge, *Human Rights and Personal Self-Defence in International Law* (OUP 2017) 3, 74 (‘No country in the world can be identified where self-defence is not legally recognised’).

¹⁷³ Axel Delannay, ‘Les homicides et lésions corporelles volontaires’ in Henri D Bosly and Christian De Valkeneer (eds), *Les infractions*, vol 2 (Larcier 2007) 370.

¹⁷⁴ Don B Kates, ‘Genocide, Murder and the Fundamental Human Right to Defend One’s Life’ (2006) 2 *J L Econ & Pol’y* 309, 312; Mary Zeiss Stange, ‘From Domestic Terrorism to Armed Revolution: Women’s Right to Self-Defence as an Essential Human Right’ (2006) 2 *J L Econ & Pol’y* 385.

¹⁷⁵ David Kopel, Paul Gallant and Joanne D Eisen, ‘The Human Right of Self-Defense’ (2007) 22 *BYU JPL* 43, 44.

¹⁷⁶ Christopher Schmidt, ‘An International Human Right to Keep and Bear Arms’ (2007) 15 *Wm & Mary Bill Rts J* 983, 1003.

¹⁷⁷ Dale Stephens, ‘Rules of Engagement and the Concept of Unit Self Defence’ (1998) 45 *Naval L Rev* 126, 128.

¹⁷⁸ See eg John Creole, ‘Is There a Human Right of Self-Defence?’ (2006) 2 *J L Econ & Pol’y* 319, 327-28; UNHRC, ‘Prevention of Human Rights Violations Committed with Small Arms and Light Weapons: Final Report Submitted by Barbara Frey, Special Rapporteur in Accordance with Sub-Commission Resolution 2002/25’ (27 July 2006) UN Doc A/HRC/Sub.1/58/27, para 22.

¹⁷⁹ Jan Arno Hessbruegge, *Human Rights and Personal Self-Defence in International Law* (OUP 2017) 86-87, 89.

¹⁸⁰ *ibid* 3.

rights violations committed by their governments, or, applying the concept used in this thesis, the right to revolution. Whilst this 'sub-right' is not expressly set forth in the primary sources of international law, such as treaties and custom, it gathered a broad support from prominent scholars. Noteworthy, during the classical period of international law, scholarly opinions were perhaps the most important source of international law considering the paucity of international treaties and state practice. Such scholarly works may provide a better clue on legal underpinnings of the otherwise ambiguous *sui generis* right. If it is established that the right to personal self-defence enjoys a status of a legal norm then positive underpinnings of the right to revolution as a means of self-defence against oppressive government are somewhat clarified.

Thomas Aquinas was one of the first to derive the right to resist tyranny from the natural right of self-defence: 'All who govern in the interests of themselves rather than of the common good are tyrants [...] Against the regime's efforts to enforce its decrees, one has the right of forcible resistance; as a private right this could extend as far as killing the tyrant as a foreseen side-effect of one's legitimate self-defence'.¹⁸¹ Along the same lines, Francisco de Vitoria claimed that a right to oppose tyranny springs from the natural right of self-defence: '[E]ven if the commonwealth has given away its authority it keeps its natural right to defend itself'.¹⁸² He even maintained that there was a natural right of self-defence against an evil pope. Likewise, Francisco Suarez, drawing on the works of Vitoria, asserted that self-defence is 'the greatest of rights', which may, as last resort, justify killing a tyrant 'by the authority of God, Who has granted to every man, through the natural law, the right to defend himself and his state from the violence inflicted by such a tyrant'.¹⁸³

In 1674, in *Of the Law of Nature and Nations*, Samuel Pufendorf acknowledged that the right of self-defence encompasses the right to revolt against a tyrant. If people feel unsafe under the rule of their leader, then 'a People may defend themselves against the unjust Violence of the Prince'.¹⁸⁴ Moreover, on his account, people would never enter into a social compact if the ruler demolished their inherent right of resisting an unjust government. People would rather suffer the 'Fighting and Contention' of a state of nature than to face 'certain Death' because they had given up the right to 'oppose by Arms the unjust Violence of their Superiors'.¹⁸⁵ A similar view is held by Emmerich de Vattel, who contends that the right of revolution against a tyrannical government is an extension of the right of self-defence: akin to an

¹⁸¹ Thomas Aquinas, *Summa Theologica [A Treatise on Theology]* (Parts I-II, Fathers of the English Dominican Province tr, Catholic Way Publishing 2014) 104.

¹⁸² Francisco Vitoria, *On the Law of War*, para 137, 200, cited in Anthony Pagden and Jeremy Lawrance (eds), *Vitoria Political Writings* (CUP 1991) xx.

¹⁸³ Francisco Suarez, *Defense of the Catholic Faith against the Errors of the Anglican Sect* (1613) 714, cited in David Kopel, Paul Gallant and Joanne D Eisen, 'The Human Right of Self-Defense' (2007) 22 *BYU JPL* 43, 71.

¹⁸⁴ Samuel Putendorf, *Of the Law of Nature and Nations* (The Lawbook Exchange 2005) 721-22.

¹⁸⁵ *ibid.*

ordinary criminal, a tyrant ‘is no better than a public enemy against whom the nation may and ought to defend itself’.¹⁸⁶

Other prominent theorists of state legitimacy, such as Hobbes and Locke, also insisted that the right of self-defence is so unalienable that it cannot be surrendered by the establishment of state authority. Thomas Hobbes, the famous advocate of absolute monarchy, observed that it is impossible to give up one’s right of self-defence: ‘The right men have by Nature to protect themselves, when none else can protect them, can by no Covenant [the agreement between individuals to form a government] be relinquished’.¹⁸⁷ Similarly, John Locke interrogates ‘Must men alone be debarred the common privilege of opposing force with force, which nature allows so freely to all other creatures for their preservation from injury? I answer: self-defence is a part of the law of nature, nor can it be denied the community, even against the king himself [...]’.¹⁸⁸

More contemporary voices are well reflected in the often-cited statement by Miller which reads as follows: ‘[T]he right to self-defence extends to both private and public threats, including self-defense against agents of a tyrannical government. Moreover, the right is individual. Individuals — not just communities — have the right to protect themselves from public violence. Individuals — not just militias — have the right to defend themselves against tyranny’.¹⁸⁹ Likewise, Kaufmann suggested that ‘[i]n its traditional, “classic” meaning, the right to resist is a right to social self-defence against a criminal government, which exercises its power in such a way that it results in a physical or psychological menace and threat to the people’.¹⁹⁰ Noteworthy, the recent work by Hessbruegge reveals that recognition of individual self-defence as morally and legally justified extends well beyond the West and transcends Islamic, African, Chinese and Indian traditions.¹⁹¹

These authorities provide a solid intellectual support for the conceptual affinity between self-defence and resistance to tyrannicide, or, applying more contemporary terms, unaccountable and repressive regime. Whilst the works of the quoted scholars constitute an essential (intellectual) part of international law, they are not in themselves direct sources. Thus, one may not claim that there is a positive right to personal self-defence solely on the basis thereof. However, the wide scholarly consensus among the publicists of an

¹⁸⁶ Emmerich de Vattel, *The Law of Nations; Or, Princes of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (Joseph Chitty tr, The Lawbook Exchange 2005) 18, 75.

¹⁸⁷ Thomas Hobbes, *Leviathan* (JCA Gaskin ed, OUP 2008) para 21, 147.

¹⁸⁸ John Locke, *Two Treatises of Government* (CreateSpace Independent Publishing Platform 2014) 115.

¹⁸⁹ Darrell AH Miller, ‘Retail Rebellion and the Second Amendment’ (2011) 86 Ind LJ 939, 939. For a similar viewpoint, see Kimberly Kessler Ferzan, ‘Self-Defense and the State’ (2008) 5 Ohio St J Crim L 449, 450 (‘The right to self-defense is none other than the right to resist aggression. It is a right held by the defender against the state’).

¹⁹⁰ Arthur Kaufmann, ‘A Small Scale Right to Resist’ (1986) 21 New Eng L Rev 571, 574.

¹⁹¹ Jan Arno Hessbruegge, *Human Rights and Personal Self-Defence in International Law* (OUP 2017) 40-47, 295-96.

overwhelming majority of legal systems over the existence of a certain right may accord the latter the status of a 'general principle of international law recognised by civilised nations'. In fact, the recent studies by Kopel, Gallant, Eisen and Hessbruegge are based on this suggestion.¹⁹² They surveyed the development of the right to self-defence in major legal systems, both ancient and modern, and concluded that the right in question is now a general principle of international law. Without attempting to compromise the importance of these large-scale works, it is doubtful whether ancient legal systems *per se* have any direct impact upon the development of contemporary general principles. Secondly, their concept of self-defence is rather broad encompassing also scenarios other than anti-governmental resistance, which makes it difficult to apply the results of their study to revolution as a form of self-defence. In fact, it is more difficult to justify self-defence against state authorities than self-defence between private persons since state's monopoly on the use of force is outright abandoned. Thirdly, even if one accepts an idea that self-defence is a legal norm by virtue of its status of a general principle of international law, it is not that clear whether political resistance can be conceptualised as a sub-species of self-defence solely on the basis of the broad scholarly support. Finally, the range of means of self-defence is never unlimited. They must be both necessary and proportionate. Whether revolutionary violence, which all too often results in deaths of the innocent, is always necessary and proportionate is open to debate. Considering the fact that revolution can grow into war, as happened in Syria, the suffering caused by recourse to defensive force may outweigh the value of the right sought.¹⁹³ Ultimately, whereas during the classical period of international law, wide scholarly consensus across various legal systems was sufficient for a norm to attain a status of general principle, it is doubtful whether this is the case today. One has to show that the norm in question has been affirmed in a broad plurality of national legal systems on legislative level or in any other legally relevant form. Turning to self-defence, there is no overwhelming evidence of such explicit legal recognition at the domestic levels.¹⁹⁴

This notwithstanding, international law incorporates the concept of self-defence in a variety of ways. Thus, if one finds unequivocal support for self-defence in international law, the latter's status as a general principle can be justified by its solid international legal basis. To reiterate, apart from derivation of general principles of law from municipal legal systems, it is commonly agreed that they can be deduced from international legal logic, or, what has been dubbed, *opinio juris communis*¹⁹⁵ (common legal conscience), which, in its turn, can be ascertained by investigating into the legal logic behind a

¹⁹² David Kopel, Paul Gallant and Joanne D Eisen, 'The Human Right of Self-Defense' (2007) 22 *BYU JPL* 43; Jan Arno Hessbruegge, *Human Rights and Personal Self-Defence in International Law* (OUP 2017) ch 2.

¹⁹³ See David Rodin, *War and Self-Defense* (Clarendon UP 2002) 90-92.

¹⁹⁴ See also section 6.3.3 of this thesis.

¹⁹⁵ Geza Herczegh, Jozsef Decsenyi and Gabor Pulay, *General Principles of International Law and the International Legal Order* (Academiai Kiado 1969) 36.

normative statement in the international forum. If a normative statement can be proven to constitute part of the 'common legal conscience' it can be considered being a general principle.¹⁹⁶ All in all, this suggests that general principles can be derived from acceptance directly in an international setting extending to treaty law, state practice, judicial decisions and even soft law. In what follows, it will be examined the legal contours of international acceptance of self-defence within such paradigmatic areas as the law of the use of force, the law of state responsibility and criminal law and what effect this may have for the right to revolution.

6.3.2.2. Self-Defence in International and Criminal Law

Whilst the right to personal self-defence is not explicitly recognised in the written law, some treaties suggest its existence. In international criminal law, self-defence is one of the grounds excluding criminal responsibility. According to the 1998 Rome Statute,

[A] person shall not be criminally responsible if, at the time of that person's conduct: [...] (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an *imminent* and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected [...].¹⁹⁷

Some commentators suggest that this provision has acquired status of customary norm.¹⁹⁸ Whilst it is established that the Rome Statute is only applicable to the most serious crimes, such as genocide, war crimes, crimes against humanity and aggression,¹⁹⁹ it is fair to suggest that the defences available to charges on these crimes may also be applied to the notion of revolution, if one accepts the view that revolution is a crime against a state, not to mention the situations when revolutionary violence may amount to one or more of the above-enlisted crimes. The extension of self-defence as a ground excluding criminal responsibility to situations of rebellion can also be justified by reference to the principle *ex re sed non ex nomine*, meaning that equity will look to the substance of a transaction rather than its form. This equitable

¹⁹⁶ See Christina Voight, 'The Role of General Principles in International Law and Their Relationship to Treaty Law' (2008) 31 NR 2/121, 3 at 8.

¹⁹⁷ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 31(1)(c) (emphasis added).

¹⁹⁸ Albin Eser, 'Grounds for Excluding Criminal Responsibility' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, CH Beck-Hart-Nomos 2008); Georg Werle, *Principles of International Criminal Law* (2nd edn, TMC Asser Press 2009) 203; Antonio Cassese and others, *International Criminal Law: Cases and Commentary* (OUP 2011) 461.

¹⁹⁹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 5.

principle is designed to mitigate the excessive deficiencies of formalism in situations where the blind following of formal requirements will lead to an inequitable result. It does not mean that formalities shall be dispensed with altogether but that ‘unnecessary formalities’²⁰⁰ shall be avoided.²⁰¹ It follows that punishing rebels for their acts of violence irrespective of the cause of their action, namely self-defence against serious and sustainable abuse of governmental power, may lead to complicity in oppression.

The requirement of imminence designates the temporal facet of self-defence. To be valid, the pleas of self-defence are only accepted when the lethal response of the defendant is immediate and directly responsive to the attack. Whilst it is not always clear whether governmental oppression may amount to an ‘imminent’ use of force (albeit it is by definition always ‘unlawful’ since it is in contradiction to the internationally recognised human rights, including the right to democracy) considering the fact that it does not happen overnight but is rather effectuated as a continuous and sustained state policy, it may in certain cases be regarded as imminent, particularly when peaceful demonstrations are violently suppressed, or are under a threat of being violently suppressed, and unless demonstrators do not defend themselves by using offensive force, they will compromise their success. However, the requirement of imminence precludes the use of defensive force against state officials who order, but who do not personally implement, oppressive policies, unless one subscribes to an expanded (pre-emptive or anticipatory) interpretation of self-defence.²⁰² On this view, imminence is conceived as broader than an immediate threat, and forcible resistance against an oppressive state, including its agents not directly involved in oppression, which is likely to cause harm in the future, is excused.²⁰³ However, such view is open to criticisms, with the dominant position being that ‘[I]legitimate self-defence must be neither too soon nor too late’.²⁰⁴ However, this view fails to account for modern types of warfare where recent innovations in military technology changed the whole calculus of self-defence. Nor does it accommodate the specificities of non-state violence where private actors are in a clear position of military inferiority with respect to state

²⁰⁰ Hilary Delany, *Equity and the Law of Trusts in Ireland* (3rd edn, Thomson Roundhall 2003) 34. See also section 4.4.2.4 of this thesis.

²⁰¹ In the *Nicaragua* case, the Court based its decision upon the principle of prioritisation of substance over form by recognising Nicaragua as having met the requirements of compulsory jurisdiction despite the fact that it had not formally completed the process of ratification of its acceptance of the PCIJ jurisdiction. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, paras 109-10. This view can be confirmed by the ICJ’s own (quite unspecific) pronouncement in the same judgment that ‘[t]he Court cannot regard Nicaragua’s reliance on the optional clause as in any way contrary to good faith or equity’. *Ibid* para 51.

²⁰² Ben Saul, *Defining Terrorism in International Law* (OUP 2006) 97.

²⁰³ See also *United States v Ohlendorf and others (Einsatzgruppen case)* (1953) 15 Ann Dig 411, 480 (Recognising that a threat needs not to be as imminent as a loaded pistol at one’s head for the defence to be available).

²⁰⁴ George P Fletcher, *Basic Concepts of Criminal Law* (OUP 1998) 134.

coercive machinery, which, if allowed to strike first, might significantly disadvantage an otherwise weaker opponent.

In addition to requirements of an imminent and unlawful attack, international law requires two further conditions to be met: proportionality and necessity. Both concepts are closely related to the notion of imminence, in that imminence provides an objective yardstick against which to gauge the necessity of force and to balance the aggressor/defendant interests. Both elements are recognised in the Rome Statute which provides that

The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control.²⁰⁵

Importantly, the categories of duress and necessity are substantively different: whereas duress refers to compulsion by human threats, necessity is borne by emergencies arising from natural forces or objective circumstances. This notwithstanding, the two categories are often used interchangeably and it is commonly recognised that necessity encompasses duress.²⁰⁶ Applied to revolutions, persons rebelling against their government with a view to change its authoritarian policies cannot be regarded as acting on the basis of duress/necessity since underlying cause of their action is political, rather than purely defensive (there is no concept of 'political necessity'),²⁰⁷ albeit it is fair to suggest that peaceful rallies protesting against political injustice which are violently suppressed by their government may evolve into revolutions whose primary cause is defensive.

Self-defence is also a paradigmatic norm of international law, enshrined in both the UN Charter as one of the exceptions to the prohibition on the use of force²⁰⁸ and the ILC's Articles on State Responsibility as a circumstance precluding the wrongfulness of a breach of an international obligation.²⁰⁹

²⁰⁵ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 31(1)(d).

²⁰⁶ Antonio Cassese, *International Criminal Law* (OUP 2003) 243.

²⁰⁷ Duncan Brown, 'Holding Armed Rebel Groups and Terrorist Organizations Accountable for Crimes against Humanity and War Crimes, and for "Terrorist Offenses" under International Anti-Terrorism Conventions', Åbo Akademi Institute for Human Rights 2002, 38.

²⁰⁸ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 51 ('Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security [...]').

²⁰⁹ ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, 'Report of the International Law Commission on the Work of its 53rd Session' (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10, art 21.

Whilst the two instruments are silent on their applicability to non-state actors, it is argued that, with respect to the ILC's articles, at least certain circumstances precluding wrongfulness can be applied by analogy to non-state entities.²¹⁰ Of particular relevance are articles 21 (self-defence) and 25 (necessity) of the articles on state responsibility. This is not to mean that non-state groups are now subjects of international law akin to states but to acknowledge that they are 'capable of possessing international rights and duties' and have the 'capacity to maintain [...] [their] rights by bringing international claims'.²¹¹

Article 21 reads: 'The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations'. Whereas the Charter does not contain any explicit limitations on actions taken in self-defence, the Court in the *Nicaragua* case explained that self-defence, as a norm of customary international law, would warrant only measures which are proportionate and necessary.²¹² While it is clear that self-defence as a charter right is only applicable to states, it might not be so with respect to self-defence as custom, which pre-exists international law of the Charter, particularly considering the fact that the principles of interstate self-defence were developed by drawing on the concept of personal self-defence.²¹³ As the Court had an occasion to point out, because the actual text of article 51 of the UN Charter mentions 'the inherent right of individual or collective self-defence', it is logical to assume that the right to self-defence is 'natural' and 'it is hard to see how this can be other than of a customary nature'.²¹⁴ It follows that if there is an 'inherent' or 'natural' right (*droit naturel*) to self-defence, it should equally appertain to non-state actors. As Rodin underscored, it is 'difficult to see why such groups should be denied an analogous right to defend their integrity with force'.²¹⁵ This view finds some support in the practice of national liberation movements to refer to the notion

²¹⁰ Ben Saul, *Defining Terrorism in International Law* (OUP 2006) 106.

²¹¹ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 178-79. Cf Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016) 41-50 (Suggesting a 'functional approach to international legal personality', according to which international legal personality may be attributed to any entity fulfilling the required legal criteria: 'an entity must exist independently, be capable of possessing direct international rights or obligations, and actually be in possession of such rights and obligations').

²¹² *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 176.

²¹³ Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, CUP 2011) 88. See also Jens David Ohlin, 'The Right to Exist and the Right to Resist' (12 May 2014) 11-12 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2436038> accessed 6 April 2017 ('[T]he positive rights recognised under international law — the right to be free from genocide and aggression and to exercise self-defence [...] — are traceable to two core natural rights: the right to exist and the right to resist').

²¹⁴ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 176.

²¹⁵ David Rodin, *War and Self-Defence* (Clarendon UP 2002) 160. But see Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing 2010) 127 (Arguing that international regime of the use of force, including self-defence, is not applicable to non-state actors).

of self-defence in the sense of article 51 of the UN Charter as a justification for their armed resistance.²¹⁶ If one accepts that the appeal to the Charter right of self-defence is equally applicable to revolutionary struggles (particularly considering the fact that revolutions can be regarded as a modern form of national liberation)²¹⁷ then in the exercise of their 'inherent' right of self-defence against oppression, rebellion movements must abide by international humanitarian law (obligations of total restraint) and international human rights law. Violations of the most fundamental provisions of humanitarian treaty and customary law as well as certain non-derogable human rights can hardly ever be justified by self-defence.²¹⁸

According to article 25 of ILC's articles on state responsibility,

Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.²¹⁹

Necessity is subject to strict limitations which must be cumulatively satisfied to safeguard against abuse. As the famous Webster's formula holds, it must be 'instant, overwhelming, leaving no choice of means, and no moment for deliberation';²²⁰ peril must be objectively identified and not merely apprehended as feasible;²²¹ necessity 'must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations'; it must not have been used to justify a violation of international obligation excluding the possibility of invoking necessity; the act in question must have been the 'only means' of safeguarding that interest and 'must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed'; and the state committing the act in question must not have 'contributed to the occurrence of the state of

²¹⁶ See eg Robert E Gorelick, 'Wars of National Liberation: *Jus Ad Bellum*' (1979) 11 Case W Res J Int'l L 71, 73. See also CJR Dugard, 'The OAU and Colonialism: An Inquiry into the Plea of Self-Defence as a Justification for the Use of Force in the Eradication of Colonialism' (1967) 16 Int'l & Comp LQ 157.

²¹⁷ See sections 6.3.4 and 6.5.2.

²¹⁸ See ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, 'Report of the International Law Commission on the Work of its 53rd Session' (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10, 74.

²¹⁹ *ibid* art 25.

²²⁰ *British and Foreign State Papers, 1840-1841* (Ridgway 1857) 1129, cited in ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, 'Report of the International Law Commission on the Work of its 53rd Session' (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10, 81.

²²¹ *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)* (Merits) [1997] ICJ Rep 7, para 54.

necessity'.²²² Akin to self-defence, necessity long predates existing instruments regulating inter-state relations, which means that it is a customary norm,²²³ and, thus, there is no legitimate reason to exclude its application to non-state groups. When state commits grave human rights violations, it can thereby cause an imminent peril to the essential interests of its people, who in turn may justify their defensive force on grounds of necessity. Recent cases of recognition of opposition groups by the international community in Libya, Syria and Ukraine seem to support this claim. Similarly to self-defence, necessity does not justify killings of innocents, unless such killings would prevent even worse horrors.

Yet, there is an important difference between individual right of self-defence and self-defence exercised in inter-state relations. Due to the lack of enforcement mechanisms, interstate self-defence allows states greater latitude to employ defensive action than individuals. In fact, the Rome Statute elucidates that '[t]he fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility'²²⁴ and in *Kordic and Cerkez*, the ICTY established that such operations do not justify violations of IHL.²²⁵ In *Erdemovic*, the ICTY similarly held that even defence against war crimes and crimes against humanity cannot justify the killings of innocents.²²⁶ It follows that attacks on innocent civilians may not be qualified as defensive, since such persons cannot be regarded as presenting an imminent threat of unlawful force. Less so are such actions proportionate, since proportionality implies that innocent persons shall be spared. Proportionality also requires that the quantum of lethal force used in self-defence shall not inflict greater harm than that against which it is directed. For some this would mean that as long as proportionality is concerned, it would hardly ever be possible to justify the resort to lethal force against governments that deprive their subjects of effective political participation, since innocent deaths are almost an inevitable outcome of any violent intercourse.²²⁷ However, this argument is complicated by the fact that in certain situations killing one innocent will save more lives or otherwise secure overall good effects — a so-called 'lesser evil' thesis.²²⁸ Revolutionary use of force aimed to address present political injustices and leading to innocent casualties (unless it entailed forms of violence that are categorically outlawed under international law, such as, e.g., war crimes, crimes against

²²² *ibid* paras 51-52; ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, 'Report of the International Law Commission on the Work of its 53rd Session' (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10, art 25(2).

²²³ *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)* (Merits) [1997] ICJ Rep 7, paras 51-52.

²²⁴ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 31(1)(c).

²²⁵ *Kordic and Cerkez* (Merits) ICTY-95-14/2 (26 February 2001) para 449.

²²⁶ *Erdemovic* (Appeals) IT-96-22 (7 October 1997) para 19. See also Ehrenreich R Brooks, 'Law in the Heart of Darkness: Atrocity and Duress' (2003) 43 Va J Int'l L 861.

²²⁷ David Rodin, *War and Self-Defense* (Clarendon UP 2002) 48; Ben Saul, *Defining Terrorism in International Law* (OUP 2006) 97.

²²⁸ Andrew Ashworth, *Principles of Criminal Law* (3rd edn, OUP 1999) 153.

humanity, torture, enforced disappearances and other violations of peremptory law) can be justified by a general good that it seeks to achieve, namely that the succeeding generations will live in a democratically constituted state. However, this argument easily invites abuse and may equally be employed by less benevolent actors to justify their atrocities.

In summary, the normative foundations of revolution as personal self-defence against gross and sustained human rights violations clearly transcend existing structures of international law stretching from a more general layer of legal principles to more specific subject-areas, such as international criminal law, the law of state responsibility and the law of the use of force. Yet, the constellation built on this scheme is fragile and may be based on false assumptions, which makes it vulnerable to criticisms. It is, hence, safer to conclude that the concept of self-defence is only of a limited significance when it comes to the legal justification of the right to revolution.

6.3.3. Revolution as a General Principle of Law

The right of revolution can be argued to be of itself a general principle of international law recognised by civilised nations given its wide endorsement in various constitutions of nation-states. Importantly, to qualify revolution as a general principle is not to strip it of its quality as a right. As Hessbruegge rightly noted, although international human rights are traditionally considered to be anchored in treaties and/or customary international law, there should be no legitimate objection to an idea that they may find their source in general principles.²²⁹ This view is shared by Alston and Simma, who attempted to explain the rapid recognition of the fundamental corpus of international human rights by their conceptual and structural proximity to general principles of law.²³⁰ Indeed, akin to general principles, human rights tend to be formulated in open and general terms that do not consist in ‘specific rules formulated for practical purposes, but in general propositions underlying the various rules of law which express the essential qualities of juridical truth itself’.²³¹

As was previously mentioned, there are several ways to discover general principles. The most conventional view is that general principles of international law derive from general principles generally recognised in a large number and variety of domestic legal systems.²³² This means that basic tenets

²²⁹ Jan Arno Hessbruegge, *Human Rights and Personal Self-Defence in International Law* (OUP 2017) 75.

²³⁰ Bruno Simma and Philip Alston, ‘The Sources of Human Rights Law: Custom, Jus Cogens and General Principles’ (1989) 12 *Aust YBIL* 82, 105. See also Michael O’Boyle and Michelle Lafferty, ‘General Principles and Constitutions as Sources of Human Rights Law’ in Dinah Shelton (ed), *Oxford Handbook for International Law* (OUP 2013) 221.

²³¹ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1953) 24.

²³² See eg Alfred Verdross, ‘Les principes généraux du droit dans la jurisprudence internationale’ (1935) III *RCADI* 195, 202-03; Hermann Mosler, ‘General Principles of Law’

and processes of legal justice, which are adhered to in major domestic legal systems, are direct sources of international law. Such principles may be determined through recourse to decisions of international courts and tribunals, or, in the absence of such decisions, by means of comparative law. Because the issue of revolution does not feature in the decision of any international adjudicating body, one is left with the comparative law method.

Since decisions of international adjudicative bodies do not normally reveal the method they utilised to arrive at a certain principle, it is not clear what comparative law research is exactly about. This led to a large amount of academic literature and debate. Raimondo suggested that the ascertainment of general principles of law by means of comparative law consists of two separate operations: ‘vertical move’ and ‘horizontal move’. The former involves the abstracting of principles from the rules of municipal legal systems. The second operation entails the verification that the major plurality of nations accepts the legal principle thus obtained.²³³ This two-move methodology bears some resemblance with Burke’s three-step strategy, that is, first, to follow the logic of the World Court, second, to apply this logic in the discovery of a legal principle to developed legal systems and, third, to make sure that all or nearly all developed legal systems embrace the principle in issue.²³⁴ Importantly, both Raimondo and Burke attempted to give a new meaning to the expression ‘civilised nations’ as features in article 38(3) of the ICJ Statute. Whilst for Burke, civilised nations are to be understood as ‘States with developed legal systems’,²³⁵ Raimondo, drawing on the works of Bassiouni and Tomuschat, asserted that the phrase in question should exclude nations which fail to comply with international human rights.²³⁶ Such a new interpretation of

in Rudolf Bernard (ed), *Encyclopedia of Public International Law* (Vol II, Elsevier 1995) 511-12; Alain Pellet, ‘Applicable Law’ in Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol II (OUP 2002) 1073-74; Fabian O Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff 2008) 1; James Crawford, *Brownlie’s Principles of Public International Law* (8th edn, OUP 2012) 35; Ciaran Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013) 207; Another group of scholars argue that the expression ‘general principles’ refers primarily to general principles of international law, and only to a limited extent to principles obtaining in municipal legal systems. See eg Frede Castberg, ‘La méthodologie du droit international public’ (1933) 43 RCADI 313, 370; Gaetano Morelli, ‘La théorie général du procès international’ (1937) 61 RCADI 253, 344. The third strand of commentators represented by Lauterpacht and Ripert believed that the phrase primarily encapsulated principles of private law from domestic jurisdictions that had been transposed to international law. Hersch Lauterpacht, *Private Law Sources and Analogies of International Law (with special reference to international arbitration)* (Longman, Green and Co 1927) 71, 85; Georges Ripert, ‘Règles du droit civil applicables aux rapports internationaux’ (1933) 44 RCADI 565, 569.

²³³ Fabian O Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff 2008) 45.

²³⁴ Ciaran Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013) 241-43.

²³⁵ *ibid.*

²³⁶ Fabian O Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff 2008) 52-53. See also Cherif Bassiouni, ‘A Functional Approach to “General Principles of International Law”’ (1990) 11 MJIL 768; Christian

‘civilised nations’ is useful in limiting the number of potentially examined municipal systems to those that are most developed in connection with the legal issue at hand and follow their international human rights obligations. However, in assembling the sample of the most appropriate national legal systems, one has to make sure that they represent all major legal traditions and geographical regions. In this way, the legitimacy of general principles can be enhanced.

Within this framework, the most obvious place to search for the right to revolution is world’s constitutions.²³⁷ Importantly, as Honore put it, ‘[s]overeign states can hardly be expected as a matter of course to grant their subjects a right to secede or rebel’.²³⁸ Yet, sometimes they do. Ginsburg *et al* came up with two explanations: states either enshrine such a right into constitutional text to recommit the nation to democratic rule or they may adopt it as an *ex post facto* legitimation of the leader that gained power through undemocratic means.²³⁹ The former, so called ‘forward-looking’, explanation is viable with respect to Germany, which after the Second World War, as a result of the demand imposed by the Allies to pass emergency laws, incorporated the right of revolution (*Widerstandrecht*) into its Basic Law: ‘All Germans have the right to resist anyone seeking to abolish this constitutional order, if no other remedy is available’.²⁴⁰ Similarly, a number of the Eastern European counties recognised the right to resist in their new democratic constitutions. To illustrate, the 1991 Charter of Fundamental Rights and Freedoms, which after the fall of the Czechoslovak Federative Republic became an integral component of the constitutional system of Czech Republic, provides that ‘[c]itizens have the right to resist anybody who would do away with the democratic order of human rights and fundamental freedoms, established by this Charter, if the actions of constitutional bodies or the effective use of legal means have been frustrated’.²⁴¹ The Basic provisions of the Charter were directly integrated into the Slovak Constitution, which declares that ‘[c]itizens have the right to put up resistance to anyone who would

Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law’ (1999) 281 RCADI 9, 337-38.

²³⁷ The author of this piece is deeply indebted to Ginsburg and others for their wide-scale and comprehensive empirical analysis of every national (written) constitution from 1781 to 2011 in terms of their adoption of the right to resist. See Tom Ginsburg, Daniel Lansberg-Rodriguez and Mila Versteeg, ‘When to Overthrow Your Government: The Right to Resist in the World’s Constitutions’ (2013) 60 UCLA L Rev 1184.

²³⁸ Tony Honore, ‘Right to Rebel’ (1988) 8 Oxford J Leg Stud 34, 42.

²³⁹ Tom Ginsburg, Daniel Lansberg-Rodriguez and Mila Versteeg, ‘When to Overthrow Your Government: The Right to Resist in the World’s Constitutions’ (2013) 60 UCLA L Rev 1184, 1208.

²⁴⁰ Gesetz zur Ergänzung des Grundgesetzes [Law Amending Basic Law] (24 June 1968) BGBl 709, art 20(4).

²⁴¹ Charter of Fundamental Rights and Freedoms, Resolution on the declaration of the Charter of Fundamental Rights and Freedoms as a part of constitutional order of the Czech Republic (16 December 1992) art 23
<http://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Listina_english_version.pdf> accessed 20 April 2016.

eliminate the democratic order of human rights and basic liberties listed in this Constitution, if the activity of constitutional bodies and the effective use of legal means are rendered impossible'.²⁴² Likewise, the 1992 Estonian Constitution acknowledges every Estonian citizen's 'right to initiate resistance against a forcible change of the constitutional order' provided that 'no other means are available'.²⁴³

The second device to entrench the right to resist into the text of a constitution was to adopt it after a fundamentally undemocratic event with the purpose to backwardly legitimise it. History abounds with examples of such constitutional designs.²⁴⁴ Since the purpose of this study is to examine contemporary legal constitutions with the view to ascertain whether the right to resist is globally recognised to be qualified as a general principle of law, one has to stick to modern constitutional texts. Nowadays, it is primarily in Latin America where the right to resistance was incorporated into constitutions as a backward-looking justification. The Constitution of Venezuela is but one relevant case. It was modified by the president Hugo Chavez who, albeit being elected through democratic elections, embraced a right to resist to effectuate an *ex post facto* legitimisation of his illegal acts committed prior to his consolidation of power, including the attempted *coup d'état* in 1992.²⁴⁵ Thus, he replaced the 1961 Venezuelan Constitution with a new one containing a brand-new right: 'The people of Venezuela, true to their republican tradition and their struggle for independence, peace and freedom, shall disown any regime, legislation or authority that violates democratic values, principles and guarantees or encroaches upon human rights'.²⁴⁶ A right to resist was also introduced into the Constitution of Togo in the aftermath of the military coup: 'Tout citoyen a le devoir de combattre toute personne ou groupe de personnes qui tenterait de changer par la force l'ordre démocratique établi par la présente constitution'.²⁴⁷

To be sure, the distinction between the forward-looking and backward-looking tools to codify the right to resist into the text of a constitution is not relevant for the purpose of the ascertainment whether the right in question is recognised by the plurality of major legal systems. This division is embraced here to theoretically facilitate the understanding by the reader of how constitution-makers went about the inclusion of such controversial a right into

²⁴² The Constitution of the Slovak Republic (3 September 1992) art 32 <<http://www.slovakia.org/sk-constitution.htm>> accessed 20 April 2016.

²⁴³ Constitution of the Republic of Estonia (28 June 1992) para 53 <<https://www.president.ee/en/republic-of-estonia/the-constitution/>> accessed 20 April 2016.

²⁴⁴ For a more detailed overview, see Tom Ginsburg, Daniel Lansberg-Rodriguez and Mila Versteeg, 'When to Overthrow Your Government: The Right to Resist in the World's Constitutions' (2013) 60 UCLA L Rev 1184, 1213-16.

²⁴⁵ *ibid* 1215-16.

²⁴⁶ Constitution of the Bolivarian Republic of Venezuela (20 December 1999) art 350 <<http://venezuelanalysis.com/constitution>> accessed 20 April 2016.

²⁴⁷ La Constitution de la Iwe République (27 September 1992) art 45 <http://www.legitogo.gouv.tg/annee_txt/1992/Pages%20from%20jo_1992-036.pdf> accessed 9 September 2016.

the highest laws of their countries. Moreover, the overlap between these two strategies is emphasised by the fact that the backward-looking strategy may eventually evolve into forward-looking when the same constitution sets the framework for oncoming democratic regimes. That said, other countries that expressly recognised the right of revolution whether as an insurance policy against democratic backsliding or as a means to retroactively uphold legitimacy of past political crimes are Algeria,²⁴⁸ Argentina,²⁴⁹ Azerbaijan,²⁵⁰ Benin,²⁵¹ Cape Verde,²⁵² Chad,²⁵³ Cuba,²⁵⁴ Democratic Republic of Congo,²⁵⁵

²⁴⁸ Constitution of the People's Democratic Republic of Algeria (23 February 1989) art 27 <https://www.constituteproject.org/constitution/Algeria_2008.pdf?lang=en> accessed 21 April 2016 ('Algeria shall extend its solidarity to all peoples who are fighting for political and economic liberation, for the right of self-determination and against all racial discrimination').

²⁴⁹ National Constitution of the Argentine Republic (22 August 1994) art 36 <http://pdba.georgetown.edu/Constitutions/Argentina/argen94_e.html> accessed 21 April 2016 ('This Constitution shall rule even when its observance is interrupted by acts of force against institutional order and democratic system [...] All citizens shall have right to oppose resistance to those committing the acts of force stated in this section').

²⁵⁰ The Constitution of the Azerbaijan Republic (27 November 1995) art 54(2) <https://www.constituteproject.org/constitution/Azerbaijan_2009.pdf?lang=en> accessed 29 April 2016 ('Every Citizen of the Azerbaijan Republic shall have the right to independently show resistance to the attempt of a mutiny against the State or forced change of the constitutional order').

²⁵¹ Constitution de la République du Bénin (2 December 1990) art 66 <<http://www.cour-constitutionnelle-benin.org/lacourpresent/decrets/Constitution.pdf>> ('En cas de coup d'État, de putsch, d'agression par des mercenaires ou de coup de force quelconque, tout membre d'un organe constitutionnel a le droit et le devoir de faire appel à tous les moyens pour rétablir la légitimité constitutionnelle, y compris le recours aux accords de coopération militaire ou de défense existants. Dans ces circonstances, pour tout Béninois, désobéir et s'organiser pour faire échec à l'autorité illégitime constituent le plus sacré de droits et le plus impératif des devoirs').

²⁵² The Constitution of the Republic of Cape Verde (4 September 1992) art 18 <https://www.unodc.org/tldb/pdf/Cape_Verde_const_1992.pdf> accessed 29 April 2016 ('Any citizen shall have the right not to obey any order that offends his right, liberties and guarantees and to resist by force any illegal aggression, when the recourse to the public authority is not possible').

²⁵³ Constitution of the Republic of Chad (31 March 1996) preamble <https://www.constituteproject.org/constitution/Chad_2005.pdf?lang=en> accessed 29 April 2016 ('We the Chadian People: [...] Solemnly proclaim our right and our duty to resist and disobey any individual or group of individuals, any organs of the State that would take power by force or exercise it in violation of this Constitution; [...] Affirm out total opposition to any regime of which the policy would be founded on arbitrariness, dictatorship, injustice, corruption, extortion, nepotism, claims, tribalism, confessionals and the confiscation of power. [...] This preamble is made an integral part of the Constitution').

²⁵⁴ The Constitution of the Republic of Cuba (15 February 1976) art 3 <<http://www.constitutionnet.org/files/Cuba%20Constitution.pdf>> accessed 29 April 2016 ('All citizens have the right to fight, using all means, including armed struggle, when no other recourse is possible, against anyone attempting to overthrow the political, social, and economic order established by this Constitution').

²⁵⁵ Constitution de la République Démocratique du Congo (18 February 2006) preamble <<http://www.wipo.int/edocs/lexdocs/laws/fr/cd/cd001fr.pdf>> accessed 29 April 2016 ('Tout Congolais a le devoir de faire échec à tout individu ou groupe d'individus qui prend le pouvoir par la force ou qui l'exerce en violation des dispositions de la présente Constitution').

Ecuador,²⁵⁶ El Salvador,²⁵⁷ France,²⁵⁸ Gambia,²⁵⁹ Ghana,²⁶⁰ Greece,²⁶¹ Guatemala,²⁶² Guinea,²⁶³ Honduras,²⁶⁴ Lithuania,²⁶⁵ Mexico,²⁶⁶ Paraguay,²⁶⁷ Peru,²⁶⁸ Portugal,²⁶⁹ South Sudan,²⁷⁰ Timor-Leste,²⁷¹ and Uganda.²⁷²

²⁵⁶ Constitution of the Republic of Ecuador (28 September 2008) arts 98 and 416(8) <<http://pdpa.georgetown.edu/Constitutions/Ecuador/english08.html>> accessed 29 April 2016 (Art 98: 'Individuals and communities shall be able to exercise the right to resist deeds or omissions by the public sector or natural persons or non-state legal entities that undermine or can undermine their constitutional rights or call for recognition of new right'. Art 416(8): '[Ecuador] condemns all forms of imperialism, colonialism, and neocolonialism and recognizes the right of peoples to resist and free themselves from all forms of oppression').

²⁵⁷ Constitution of the Republic of El Salvador (15 December 1983) arts 87 and 88 <<http://www.constitutionnet.org/vl/constitution-republic-el-salvador>> accessed 29 April 2016 (Art 87: 'The right of the people to insurrection is recognized, for the sole object of reestablishing constitutional order altered by the transgression of the norms relative to the form of government or to the political system established, or for serious violations of the rights consecrated in this Constitution'. Art 88: 'The principle that a President cannot succeed himself is indispensable for the maintenance of the established form of government and political system. Violation of this norm makes insurrection an obligation').

²⁵⁸ Constitution de la République française (4 October 1958) preamble referring to Déclaration des droits de l'homme et du citoyen de 1789 (art 2) <<http://www.assemblee-nationale.fr/connaissance/constitution.asp>> accessed 29 April 2016 ('Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'Homme. Ces droits sont la liberté, la propriété, la sûreté et la résistance à l'oppression').

²⁵⁹ Constitution of the Republic of the Gambia (16 January 1997) art 6(2) <<https://www1.umn.edu/humanrts/research/gambia-constitution.pdf>> accessed 2 May 2016 ('All citizens of The Gambia have the right and the duty at all times to defend this Constitution and, in particular, to resist, to the extent reasonably justifiable in the circumstances, any person or group of persons seeking or attempting by any violent or unlawful means to suspend, overthrow or abrogate this Constitution or any part of it').

²⁶⁰ Constitution of the Republic of Ghana (28 April 1992) arts 3(4) and 3(5) <<http://www.ghanaweb.com/GhanaHomePage/republic/constitution.php>> accessed 29 April 2016 (Art 3(4): 'All citizens of Ghana shall have the right and duty at all times — (a) to defend this Constitution, and in particular, to resist any person or group of persons seeking to commit any of the acts referred to in clause (3) of this article; and (b) to do all in their power to restore this Constitution after it has been suspended, overthrown, or abrogated as referred to in clause (3) of this article'. Art 3(5): 'Any person or group of persons who suppresses or resists the suspension, overthrow or abrogation of this Constitution as referred to in clause (3) of this article, commit no offense').

²⁶¹ The Constitution of Greece (11 June 1975) art 120(4) <<http://www.hri.org/docs/syntagma/>> accessed 29 April 2016 ('Observance of the constitution is entrusted to the patriotism of the Greeks who shall have the right and the duty to resist by all possible means against anyone who attempts the violent abolition of the Constitution').

²⁶² Constitution of the Republic of Guatemala (31 May 1985) art 45 <https://www.constituteproject.org/constitution/Guatemala_1993.pdf> accessed 29 April 2016 ('The Resistance of the people for the protection and defense of the rights and guarantees granted in the Constitution is legitimate').

²⁶³ Constitution of the Republic of Guinea (7 May 2010) art 21 <<http://unpan1.un.org/intradoc/groups/public/documents/unpan/unpan049269.pdf>> accessed 29 April 2016 ('They [the people of Guinea] have the right to resist oppression').

²⁶⁴ Constitution of the Republic of Honduras (11 January 1982) art 3 <<http://www.parliament.am/library/sahmanadrutyunner/Honduras.pdf>> accessed 29 April 2016 ('No one owes obedience to a usurping government nor to those who assume office or public service by force of arms or by using means or procedures which violate or ignore the provisions

established by this Constitution and other laws. The acts adopted by such authorities are null. The people have the right to resort to insurrection in defense of the constitutional order”).

²⁶⁵ The Constitution of the Republic of Lithuania (25 October 1992) art 3 <<http://www3.lrs.lt/home/Konstitucija/Constitution.htm>> accessed 29 April 2016 (‘No one may restrict or limit the sovereignty of the Nation or arrogate to himself the sovereign powers belonging to the entire Nation. The Nation and each citizen shall have the right to resist anyone who encroaches on the independence, territorial integrity, and constitutional order of the State of Lithuania by force’).

²⁶⁶ Constitution of the United Mexican States (5 February 1917) art 136 <https://www.constituteproject.org/constitution/Mexico_2007.pdf> accessed 29 April 2016 (‘This Constitution shall not lose its force and effect (fuerza y vigor) even if its observance is interrupted by rebellion. In the event that a government whose principles are contrary to those that are sanctioned herein should become established as a result of a public disturbance, as soon as the people recover their liberty, its observance shall be reestablished, and those who had taken part in the government emanating from the rebellion, as well as those who cooperated with such persons, shall be judged in accordance with this Constitution and the laws that have been enacted by virtue thereof’).

²⁶⁷ Constitution of the Republic of Paraguay (20 June 1992) art 138 <https://www.constituteproject.org/constitution/Paraguay_2011.pdf?lang=en> accessed 29 April 2016 (‘The citizens are authorized to resist those usurpers, through every means at their reach. In the hypothesis that [a] person or group of persons, invoking any principle or representation contrary to this Constitution, [should] wield the public power, their actions are declared null and of no validity [valor], nonbinding and, for this, the People exercising their right to resist oppression, are excused from complying with them. The foreign states that, for any circumstance, relate themselves to such usurpers, may not invoke any pact, treaty or agreement subscribed to or authorized by the usurping government, [so as] to demand it later as an obligation or commitment of the Republic of Paraguay’).

²⁶⁸ Constitution of the Republic of Peru (31 December 1993) art 46 <https://www.constituteproject.org/constitution/Peru_2009.pdf?lang=en> accessed 29 April 2016 (‘No one owes obedience to a usurper government or to anyone who assumes public office in violation of the Constitution and the law. The civil population has the right to insurrection in defense of the constitutional order. Acts of those who usurp public office are null and void’).

²⁶⁹ Constitution of the Portuguese Republic (2 April 1976) arts 7(3) and 21 <https://www.constituteproject.org/constitution/Portugal_2005.pdf?lang=en> accessed 29 April 2016 (Art 7(3): ‘Portugal shall recognise peoples’ rights to self-determination and independence and to development, as well as the right to insurrection against all forms of oppression’. Art 21: ‘Everyone shall possess the right to resist any order that infringes their rights, freedoms or guarantees and, when it is not possible to resort to the public authorities, to use force to repel any aggression’).

²⁷⁰ The Transitional Constitution of South Sudan (9 July 2011) art 4(3) <https://www.constituteproject.org/constitution/South_Sudan_2011.pdf> accessed 2 May 2016 (‘Every citizen shall have the duty to resist any person or group of persons seeking to overthrow the constitutional government or suspend or abrogate this Constitution’).

²⁷¹ Constitution of the Democratic Republic of Timor-Leste (20 May 2002) art 28 <https://www.constituteproject.org/constitution/East_Timor_2002.pdf?lang=en> accessed 29 April 2016 (‘All citizens have the right to disobey and to resist illegal orders or orders that affect their fundamental rights, freedoms and guarantees. The right to self-defense is guaranteed to all, in accordance with the law’).

²⁷² The Constitution of the Republic of Uganda (8 October 1995) arts 3(4) and 3(5) <http://www.statehouse.go.ug/sites/default/files/attachments/Constitution_1995.pdf> accessed 29 April 2016 (Art 3(4): ‘All citizens of Uganda shall have the right and duty at all times — (a) to defend this Constitution and, in particular, to resist any person or group of persons seeking to overthrow the established constitutional order; and (b) to do all in their power to restore this Constitution after it has been suspended, overthrown, abrogated or amended contrary to its provisions’. Art 3(5): ‘Any person or group of persons who, as required by clause (4) of this

Apart from forward-looking and backward-looking strategies to explicitly incorporate the right of revolution into the text of a constitution, one may find implicit endorsements of revolution in the preambles of constitutions. For instance, the Algerian Constitution explicitly refers to the 1945 Revolution as a legitimate event and builds on the values of the Revolution.²⁷³ Likewise, the Constitution of Iran mentions in the preamble ‘the great Islamic Revolution of Iran’ as ‘a united movement of the people’ against ‘despotic rule’.²⁷⁴ Similar provisions are enshrined in the Constitution of Afghanistan that acknowledges ‘jihad and just resistance of all the peoples of Afghanistan’²⁷⁵ and the transitional Libya’s Constitution that explicitly justifies the legitimacy of the Revolution of 17 February 2011.²⁷⁶ Similarly, the Constitution of Cuba acknowledges ‘heroism and sacrifice’ of ‘our ancestors’ who ‘defended the Revolution at the cost of their lives, thus contributing to its definitive consolidation’.²⁷⁷

The right to forcefully resist may also be implied from the text of the constitution. For instance, the Constitution of the Dominican Republic provides that ‘the acts issued by usurped authority, [and] the actions or decisions of the public powers, institutions or persons that alter or subvert the constitutional order and any decision reached by requisition of armed force, are null of plain right’.²⁷⁸ In the same vein the Hungarian Constitution asserts that ‘[n]obody may direct their activity at the acquisition or exercise of public authority by force, or seek its exclusive possession’. However, it introduces the right to resist with a caveat: ‘Everyone shall have the right and obligation to resist by *lawful means* such attempts’. Moreover, ‘[o]nly state authorities shall have the exclusive right to use force in order to enforce the Constitution and laws’.²⁷⁹ It seems that the Hungarian Constitution merely recognises a right to civil disobedience, which is a progeny of the general right to resist but falls short of the right to revolution. However, absent legitimate state authorities

article, resists the suspension, overthrow, abrogation or amendment of this Constitution commits no offence’).

²⁷³ Constitution of the People’s Democratic Republic of Algeria (23 February 1989) preamble, arts 9, 62, 73, 76 <http://confinder.richmond.edu/admin/docs/local_algeria.pdf> accessed 9 September 2016.

²⁷⁴ Constitution of Islamic Republic of Iran (3 December 1979) preamble <https://www.constituteproject.org/constitution/Iran_1989.pdf?lang=en> accessed 9 September 2016.

²⁷⁵ The Constitution of Afghanistan (4 January 2004) preamble <<http://www.afghanembassy.com.pl/afg/images/pliki/TheConstitution.pdf>> accessed 9 September 2016.

²⁷⁶ Libya’s Constitution (3 August 2011) preamble <https://www.constituteproject.org/constitution/Libya_2011.pdf> accessed 9 September 2016.

²⁷⁷ The Constitution of the Republic of Cuba (15 February 1976) preamble <<http://www.constitutionnet.org/files/Cuba%20Constitution.pdf>> accessed 29 April 2016.

²⁷⁸ The Constitution of the Dominican Republic (26 January 2010) art 73 <<http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan048943.pdf>> accessed 29 April 2016.

²⁷⁹ Constitution of Hungary (18 April 2011) art C <https://www.constituteproject.org/constitution/Hungary_2011.pdf> accessed 29 April 2016.

and effective legal framework to invoke ‘lawful means’ it would be against the spirit of the constitution to forbid a more robust resistance. It follows that the right to revolution is effectively implied. This is also the case with other constitutions that explicitly refer to the right to civil disobedience.²⁸⁰ The right to revolution can also be implied from the Constitution of Maldives, which, absent the expressive reference to the right of resistance by any means, states: ‘No employee of the State shall impose any orders on a person except under authority of a law. Everyone has the right not to obey an unlawful order’.²⁸¹ Similar provisions are contained in the constitutions of Mozambique,²⁸² Rwanda²⁸³ and Uruguay.²⁸⁴

Ultimately, absent explicit or implicit references to the right of revolution in the text of national constitutions, States, in terms of Sumida, are nonetheless presumed to recognise the right concerned since it is considered to be ‘one of the pillars of Western civilization’.²⁸⁵ For instance, in the midst of the 2013-14 Euromaidan revolution in Ukraine, Lyubomyr Guzar, a former head of the Ukrainian Greek Catholic Church, claimed that it was not necessary to entrench the right to revolution into the text of the Ukrainian constitution because it is a ‘law of nature’. Under this law every individual and every nation

²⁸⁰ See Constitution of Burkina Faso (2 June 1991) art 167 <https://www.constituteproject.org/constitution/Burkina_Faso_2012.pdf?lang=en> accessed 29 April 2016 (‘The Source of legitimacy follows from this Constitution. All power which does not derive its source from this Constitution, notably that resulting from a coup d’etat or from a putsch is illegal. In this case, the right to civil disobedience is recognized to all citizens’); Constitution of the Republic of Mali (12 January 1992) art 121 <https://www.constituteproject.org/constitution/Mali_1992.pdf?lang=en> accessed 29 April 2016 (‘The foundation of all authority in the Republic of Mali resides in the Constitution. The republican form of the State shall not be subject to question. The people have the right to civil disobedience for the preservation of the republican form of the State. Any coup d’etat or putsch shall be an imprescriptible crime against the Malian People’).

²⁸¹ Constitution of the Republic of Maldives (7 August 2008) art 64 <<http://www.presidencymaldives.gov.mv/Documents/ConstitutionOfMaldives.pdf>> accessed 29 April 2016.

²⁸² Constitution of the Republic of Mozambique (2 November 1990) art 80(2) <http://www1.chr.up.ac.za/undp/domestic/docs/c_Mozambique.pdf> accessed 29 April 2016 (‘All citizens shall have the right not to comply with orders that are illegal or which would infringe upon their Constitutional or other legal rights’).

²⁸³ Constitution of the Republic of Rwanda (26 May 2003) art 48 <https://www.constituteproject.org/constitution/Rwanda_2010.pdf> accessed 29 April 2016 (‘In all circumstances, every citizen, whether civilian or military, has the duty to respect the Constitution, other Laws and regulations of the country. He/she has the right to defy orders received from his/her superior authority if the orders constitute a serious and manifest violation of human rights and public freedoms’).

²⁸⁴ Constitution of Uruguay (27 November 1966) art 10 <<http://landwise.resourceequity.org/record/467>> accessed 29 April 2016 (‘No inhabitant of the Republic shall be obliged to do what the law does not require or prevented from doing what it does not prohibit’).

²⁸⁵ Gerald Sumida, ‘The Right of Revolution: Implications for International Law and Order’ in Charles A Barker (ed), *Power and Law: American Dilemma in World Affairs* (The John Hopkins Press 1971) 130. See also Aleksandr Marsavelski, ‘The Crime of Terrorism and the Right of Revolution in International Law’ (2013) 28 Conn J Int’l L 241, 273.

have a right to self-defence: '[O]ne may resort to arms when facing arms'.²⁸⁶ For other commentators, it is not the redundancy of positive norms on the right to rebellion that is at stake but rather unacceptability of incorporating such norms into the constitutional texts. Such positivisation contradicts the very essence of the right to revolution 'because it would be the fixture by statute of a right which by its nature can exist only above any statute, the regulation of something which in no way can be regulated'. In other words, '[a] legal system cannot institutionalise its own control outside of the system from within the system'.²⁸⁷ Finally, it is important to bear in mind that national constitutions do not typically provide for an exhaustive list of human rights and freedoms, which means that the right to revolution is effectively implied.

It remains to be ascertained what standard one has to be guided by in determining whether the right to revolution is a general principle shared by the majority of national legal systems. Should one refer solely to explicit entrenchment of the right to revolution in the constitutional texts, one is solely left with about twenty per cent of the world's (written) constitutions recognising the right in question, which is clearly not enough for meeting the criteria of plurality and representativeness of a general principle of international law recognised by civilised nations. If one includes also constitutions that contain provisions logically implying the right concerned, one would definitely be closer to meeting the criteria, but the robustness of such strategy is essentially compromised by the lack of precision and the unjustified generalisation. Lastly, if one endorses the natural law pedigree of the right to revolution without attempting to locate its positive sources, one cannot claim undertaking objective comparative study and renders himself bare to the accusations of wishful thinking and exercise in politics rather than law.

Further, the mere textual similarity of the revised constitutional provisions may not be sufficient for claiming that the right to revolution is a general principle. General principles are abstractions from concrete legal rules, whose contents are different from those of the legal rules from which they are derived.²⁸⁸ This means that provisions of municipal law cannot be relied on as embodying general principles as they stand but by the way of analogy, considering the distinctiveness of the international legal system vis-à-vis municipal legal orders. This point was clearly emphasised in the *South West Africa* cases, where South Africa contended that general principles of law

²⁸⁶ Lyubomyr Guzar, 'Pravo na povstannya — to ye zakon pryrody' *Ukraina Moloda* (10 January 2011) <<http://www.umoloda.kiev.ua/number/2395/180/85201/>> accessed 30 June 2016. See also SP Pogrebnyak and EA Uvarova, 'Soprotivlenie ugneteniyu. Povstanie. Revolyuciya (teoretiko-pravovoy analiz v svete doktriny prav cheloveka)' [Resistance to Oppression. Rebellion. Revolution (Theoretical-Legal Analysis in Light of the Doctrine of Human Rights)] (2013) 2 *Pravo i gromadyanske suspilstvo* 4, 25.

²⁸⁷ Arthur Kaufmann, 'A Small Scale Right to Resist' (1986) 21 *New Eng L Rev* 571, 573.

²⁸⁸ See Max Sorensen, 'Principes de droit international public. Cours general' (1960) 101 *RCADI* 1, 25.

[A]re taken from the realm of municipal law, they are elevated by analogy from that law into international law relationships and applied there [...]. They relate to the definition of legal relationships in domestic law [...] and from those relationships they are then taken by way of analogy [and] applied in the sphere of relationships as they obtain in international law.²⁸⁹

South Africa's approach was endorsed by Judge Tanaka²⁹⁰ and represents the classic view of the mechanism of ascertainment of general principles.²⁹¹ Turning to the question of revolution as obtained in constitutional provisions of domestic systems, in addition to the varying underlying rationale expounded in such provisions, ranging from the reference to their natural law pedigree or their role as a means to realise an inherent right to self-defence against tyranny, such provisions vary in the scope and extent of the permitted resistance, and whether the latter is qualified as a right or as a duty.²⁹² Thus, in order to derive an abstract general principle out of these provisions, one has to do away with some of their particular elements. Importantly, minor differences in the content of constitutional right-to-resist provisions pertaining to different national legal systems do not hinder the determination of a general principle of law. What matters is the existence of a common legal principle underlying these provisions.²⁹³ It therefore suffices to establish that the current problem in international law is analogous to one obtaining in the domestic sphere, and that the domestic solution is one which is adequate to account for the international law problem. Thus, the 'task of deriving general principles of law from national laws should not consist of looking technically for coincidences among legal rules, but of determining their common denominator'.²⁹⁴ How exactly this is to be done is not clear. Even though the Court has faced this challenge on several occasions, it has never engaged in expounding this process in any clear and consistent manner.

All in all, with very few exceptions, national laws do not endorse the right of revolution, nor could they be expected to do so. It is inherently against the established legal order of the state to institutionalise the means for its own destruction: 'The pre-revolutionary set of legitimising norms, the earlier paradigm, can in no way conceive legitimacy for its revolutionary replacement.

²⁸⁹ *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Pleadings) cited in Hugh Thirlway, *The Law and Procedure of the International Court of Justice*, vol 1 (OUP 2013) 238.

²⁹⁰ *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Merits) Dissenting Opinion of Judge Tanaka [1966] ICJ Rep 6, 296-97 ('If we limit the application of Article 38, paragraph 1 (c), to a strict analogical extension of certain principles of municipal law, we must recognise that the contention of the Respondent is well-founded').

²⁹¹ Hugh Thirlway, *The Law and Procedure of the International Court of Justice*, vol 1 (OUP 2013) 238.

²⁹² For a more comprehensive analysis, see Tom Ginsburg, Daniel Lansberg-Rodriguez and Mila Versteeg, 'When to Overthrow Your Government: The Right to Resist in the World's Constitutions' (2013) 60 UCLA L Rev 1184, 1221-28.

²⁹³ See eg Michael Akehurst, 'Equity and General Principles of Law' (1976) 25 ICLQ 801, 814.

²⁹⁴ Fabian O Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff 2008) 49.

The pre-and post-revolutionary sets of fundamental values are utterly incompatible'.²⁹⁵ Moreover, considering the fact that the right in question was frequently codified into the text of national constitutions *ex post facto*, that is as a means of legalisation of the unconstitutional transfer of power, it is logical to assume that its status as a constitutional right to be implemented akin to other rights is rather dubious, if not outrightly suspended.

6.3.4. Revolution as a Legitimate Belligerency

Whenever revolution crosses the threshold of an armed conflict, international humanitarian law (IHL) is an appropriate normative framework. There are certain guarantees in IHL with respect to self-determination movements that imply the lawfulness, or, more precisely, the permissibility, of non-state violence if effectuated in conformity with international humanitarian norms irrespective of its cause. Importantly, whilst IHL is designed to serve neutral humanitarian purposes, not to confer legitimacy and/or legality upon actors taking part in hostilities,²⁹⁶ dealing with revolutionary violence within the framework of IHL would assist in depoliticising the notion of revolution and place it within the setting of applicable legal rules, as opposed to the more conventional '*fait accompli*' status.

Under international laws of war, the highest degree of protection of persons taking a direct part in hostilities is ensured by according them a (privileged) combatant status (belligerent status), meaning that persons meeting the requisite criteria for designation as combatant will not be punished for legitimate acts of war. In principle, this can only be done in cases of international armed conflicts and with respect to all members of the armed forces of a party to the conflict as well as members of a *levée en masse*.²⁹⁷ Liberation movements are not explicitly mentioned in the Geneva Conventions. Yet, it has been suggested that under certain conditions the four Geneva Conventions may be applicable to wars of national liberation.²⁹⁸ Whilst the Conventions are in principle open to states only, they contain two provisions governing the possible accession to them or their acceptance. The common articles including accession provisions state: 'From the date of its coming in force, it shall be open to any Power on whose name the present

²⁹⁵ Isaac Kramnick, 'Reflections on Revolution: Definition and Explanation in Recent Scholarship' (1972) 11 *Hist & Theory* 26, 34.

²⁹⁶ To say that a non-state group has rights and duties when it participates in war (*jus in bello*) is not the same as saying that it has the authority to initiate a war (*jus ad bellum*).

²⁹⁷ Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GC III) art 4.

²⁹⁸ Georges Abi-Saab, 'Wars of National Liberation and the Laws of War' (1972) 3 *Annales d'Études Internationales* 93, 104; Jean Salmon, 'Les guerres de libération nationale' in Antonio Cassese (ed), *The New Humanitarian Law of Armed Conflict* (Napoli 1979) 72-73; Georges Abi-Saab, 'Wars of National Liberation in the Geneva Conventions and Protocols' (1979) 165 *RCADI* 353, 400ff.

Convention has not been signed, to accede to this Convention'.²⁹⁹ The other common provision is article 2(3), which conditions the participation in the Conventions on acceptance and actual application: 'Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof'. It has been asserted that the term 'Power' can also refer to non-state actors, such as liberation movements, and that the latter can therefore be bound by the Conventions under one of the two above-mentioned provisions. Yet, this view did not attain wide support, particularly considering the context and the wording of the various provisions of the Geneva Conventions which imply that the term 'Powers' was intended to refer to states.³⁰⁰ This has been supported by the ICRC.³⁰¹ Thus, the four Geneva Conventions do not directly apply to non-state actors pursuing the cause of liberation (apart from Common Article 3 establishing minimum protection for people in wartime, which is commonly agreed to be the only article applicable in non-international conflicts).

The 1977 Protocol I to the Geneva Conventions broadened the applicability of rules regarding international armed conflicts to situations that 'include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'.³⁰² Thus, peoples' struggle for self-determination is not a mere domestic issue. In response to states' fears that such provision recognised the legitimacy of any anti-governmental force, including 'terrorist', on the basis of a 'cause',³⁰³ the ICRC made clear that there should be at a minimum a certain level of international personality before the

²⁹⁹ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GC I) art 60; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (GC II) art 59; Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GC III) art 139; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GC IV) art 155.

³⁰⁰ See eg Antonio Cassese, 'Wars of National Liberation and Humanitarian Law' in Paola Gaeta and Salvatore Zappala (eds), *The Human Dimension of International Law* (OUP 2008) 102.

³⁰¹ See The 2016 ICRC Commentary to the First Geneva Convention, para 3205 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=048E738DAE0DF9CFC1257F7A00583D5F#8_B> accessed 1 March 2017 ('[E]ntities wishing to accede to the Conventions have to be a "State", ie they have to fulfil the criteria of statehood defined by international law').

³⁰² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 17512 (Geneva Protocol I) art 1.

³⁰³ The Protocol was even christened a 'law in the service of terror'. See Douglas J Feith, 'Law in the Service of Terror' (1985) 1 *National Interest* 36.

use of force by a liberation group can be viewed as legitimate.³⁰⁴ Moreover, the just cause was strictly confined to three scenarios: fight against colonial domination, alien occupation and racist regimes. Self-determination struggles fought against other types of regimes, e.g. authoritarian and repressive regimes, seem to fall foul of the Protocol's scope of application. Yet, the preparatory works reveal that some states adopted a more relaxed view on self-determination which, as the argument proceeded, also encompassed other classes of wars of national liberation, not exhausted by the three enumerated types of situations.³⁰⁵ This position was rapidly picked up by the literature.³⁰⁶ As Wilson has famously commented in relation to article 1 of Protocol I, 'its subjective character makes it a prime target for flexible interpretation based on the exigencies of the moment'.³⁰⁷ One should also note the word 'include' in paragraph 4 of article 1, which implies *prima facie* that the list is not exhaustive. Indeed, the practice of the UN and the Declaration on Friendly Relations, to which the article refers, exhibit strong evidence of an open-ended understanding of the right to self-determination, that is as a right appertaining to all peoples equally and in every respect and not confined to the three enlisted scenarios.

This thesis suggests that since the notion of self-determination has significantly broadened since its initial decolonisation context (to cover cases of consistent pattern of gross and reliably attested human rights violations amounting to denial of the people's right to dispose of themselves not only externally but also internally), to confine it to the three aforementioned situations is utterly outdated not only because these situations are far less frequent in the post-colonial era and are bound to disappear in the near future but also because such limited understanding of self-determination is not supported by the international practice.³⁰⁸ Moreover, from a strictly

³⁰⁴ See Yves Sandoz and others (eds), *Commentary on the Additional Protocols of 8 June 1977* (Martinus Nijhoff 1987) 508.

³⁰⁵ Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974-77) CDDH/SR.22, para 14.

³⁰⁶ Jean Salmon, 'Les guerres de libération nationale' in Antonio Cassese (ed), *The New Humanitarian Law of Armed Conflict* (Napoli 1979) 34-35; Georges Abi-Saab, 'Wars of National Liberation in the Geneva Conventions and Protocols' (1979) 165 RCADI 353, 398, 432-33; Noelle Higgins, *Regulating the Use of Force in Wars of National Liberation: The Need for a New Regime* (Nijhoff 2010) 114; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 221.

³⁰⁷ Heather Wilson, *International Law and the Use of Force by National Liberation Movements* (Clarendon Press 1988) 168.

³⁰⁸ Steven Wheatly, *The Democratic Legitimacy of International Law* (Hart Publishing 2010) 231 (Arguing that the validity of the declaration of independence of Kosovo rests in large part on the right of the people of Kosovo to democratic self-determination). See also *Reference re: Secession of Quebec* [1998] 2 SCR 217 (Supreme Court of Canada) paras x, 135 (Concluding that the Quebec nation had the right to self-determination, which was sufficiently satisfied through political participation in the Canadian government; no external right of secession was warranted); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 88 (Recognising that the Palestinian

humanitarian standpoint, the extension of the applicability of Protocol I to a broader category of armed conflicts would result in the wider application of the humanitarian rules to these conflicts and, hence, would lead to greater safeguard of human life.³⁰⁹ The most common objections against such an extension are that the wider applicability of Protocol I would encourage non-state actors to use violent means to advance their political agenda, including terrorism, and privatise war.³¹⁰ However, the primary objective of IHL is not to legitimise cause but to delineate rights and duties of parties involved in armed hostilities, which means that conferring combatant immunity to a broader array of actors simply ensures that there is greater incentive for them to abide by the humanitarian constraints on violence. This is not to privatise war but to pragmatically accept that non-state groups already fight wars and will do so in the future even if denied combatancy. It is, thus, fair to suggest that non-state use of force in furtherance of revolution falls under the scope of article 1 of Protocol I, which means that those engaged in such use of force enjoy the full status of lawful combatants.

Further, article 44(3) of Protocol I provides for more relaxed conditions of combatancy than the previous Hague requirements³¹¹ acknowledging that warring parties failing to distinguish themselves from the civilian population retain their combatant immunity (immunity from the operation of domestic criminal law), including the POW status, if they fall into the power of an adverse party provided that they carry their arms openly during military engagements and that they are visible to the adversary while engaged in a military deployment.³¹² It is clear that article 44 complements the requirements of article 1(4) by a set of procedural criteria specifically tailored for self-determination movements. Whilst this provision has been traditionally regarded as solely applicable with respect to occupied territories and struggles

right to self-determination was infringed by the placement of the Wall and the attendant denial of economic rights and free movement).

³⁰⁹ Antonio Cassese, 'Wars of National Liberation and Humanitarian Law' in Paola Gaeta and Salvatore Zappala (eds), *The Human Dimension of International Law* (OUP 2008) 105.

³¹⁰ Elizabeth Chadwick, *Self-Determination, Terrorism, and the International Humanitarian Law of Armed Conflict* (Martinus Nijhoff 1996) 8; Adam Roberts, 'Counter-Terrorism, Armed Force and the Laws of War' (2002) 44 *Survival* 7, 7; Georges Abi-Saab, 'The Proper Role of International Law in Combating Terrorism' (2002) 1 *Chinese JIL* 305, 308.

³¹¹ See Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) art 1 of the annex <<https://ihl-databases.icrc.org/ihl/INTRO/195>> accessed 3 October 2017 (Laying down criteria which have to be met in order for parties other than state armies, such as militia and volunteer corps, to be deemed lawful combatants under the laws of war. These include: '1. To be commanded by a person responsible for his subordinates; 2. To have a fixed distinctive emblem recognizable at a distance; 3. To carry arms openly; and 4. To conduct their operations in accordance with the laws and customs of war').

³¹² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 17512 (Geneva Protocol I) art 44(3).

against colonial powers,³¹³ its *ratione personae* scope has broadened to include secessionist movements pursuing internal, rather than purely external, causes. Ultimately, members of the armed forces of a party to a conflict are considered to be combatants even ‘if that Party is represented by a government or an authority not recognised by an adverse Party’.³¹⁴ It follows that members of self-determination movements may qualify as combatants and enjoy immunity for lawful acts of war.

However, states not parties to Geneva Protocol I may continue to treat the situations of struggles for self-determination as conflicts of a non-international character. The defining feature of non-international armed conflicts and situations of lesser internal violence is states’ broad discretion as to how to deal with insurgents. It means that members of rebel movements may not be acknowledged as privileged combatants and may be subject to criminal judicial proceedings under the national laws of the state concerned. Whilst it has been suggested that article 1 of Protocol I — which internationalises self-determination movements — might be regarded as constituting at least emerging customary norm by virtue of influencing state practice,³¹⁵ it is too premature to accord a status of a customary norm to the provision that has been rarely directly evoked by states and is often characterised as possessing a largely rhetorical value.³¹⁶ This can be exacerbated by the fact that Geneva Protocol II explicitly excludes from the purview of the 1949 Geneva Conventions ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts’.³¹⁷ Whilst revolutions are by definition more than just a riot or sporadic act of violence, it is not always clear where the threshold lies. For sure, states can recognise the opposing movements as belligerent outside

³¹³ Leslie C Green, *The Contemporary Law of Armed Conflict* (2nd edn, MUP 2000) 111; Knut Ipsen, ‘Combatants and Non-combatants’ in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (OUP 2004) 77.

³¹⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 17512 (Geneva Protocol I) art 43.

³¹⁵ Leslie C Green, ‘Terrorism and Armed Conflict: The Plea and the Verdict’ (1989) 19 IYBHR 131, 136; Christopher J Greenwood, ‘Scope of Application of Humanitarian Law’ in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (OUP 2004) 43; Michael P Scharf, ‘Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects’ (2004) 36 Case W Res J Int’l L 359, 370; David W Glazier, ‘Wars of National Liberation,’ MPEPIL C15 (Spring edn, 2009) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e442?prd=EPIL>> accessed 19 September 2017; Noelle Higgins, *Regulating the Use of Force in Wars of National Liberation: The Need for a New Regime* (Nijhoff 2010) 116.

³¹⁶ Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) 203-04. Cf Georges Abi-Saab, ‘Wars of National Liberation in the Geneva Conventions and Protocols’ (1979-IV) 165 RCADI 353, 371-72; Antonio Cassese, ‘The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law’ (1984) 3 UCLA Pac Basin LJ 55, 68-71.

³¹⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Geneva Protocol II) art 1(2).

of the framework of Protocol I, which would result in the full application of the laws of war. Yet, such recognitions are extremely rare, particularly with regard to such politically sensitive events as revolutions, because recognition implies loss of control over territory and private violence and a degree of governmental failure, and states are reluctant to relinquish their sovereign authority to identify and penalise actors interfering with their monopoly to use force.³¹⁸

If the existence of an international armed conflict is not established according to the criteria outlined above, the law of a non-international armed conflict, codified in Common Article 3 and Protocol II, provides for certain guarantees for non-state groups engaged in struggles for self-determination, albeit far less satisfactory in comparison with Protocol I. Because Common Article 3 only provides for rudimentary protection to those involved in a non-international armed conflict, such as basic principles of humane treatment of persons taking no part in hostilities, and is commonly recognised as vague and impractical,³¹⁹ it has been eventually supplemented by Protocol II as ‘the first attempt to regulate by treaty the methods and means of warfare in internal conflicts’.³²⁰ However, the Protocol requires high level of intensity of conflict to be triggered, which means that it can only rarely be applied. For instance, it ties the legitimacy of the use of force by non-state armed groups to the control of territory, not to mention other requisite criteria setting a high bar for applying the Protocol: ‘This Protocol shall apply to [...] armed conflicts [...] which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, *exercise such control over a part of its territory* as to enable them to carry out sustained and concerted military operations and to implement this Protocol’.³²¹ This reflects an exceedingly conservative approach which bears little relation to reality because it fails to account for the fact that revolutionary movements all too often do not exercise control over territory since their *raison d’être* is to alter existing governmental structures, not state borders. Even if they do, states more often than not are willing to minimise, or outright deny, the existence of the requisite conditions (control of the territory, responsible command, the capability to carry out sustained and concerted military operations etc.) that would render Protocol II applicable. As

³¹⁸ Elizabeth Chadwick, *Self-Determination, Terrorism, and the International Humanitarian Law of Armed Conflict* (Martinus Nijhoff 1996) 9, 11.

³¹⁹ See eg Noelle Higgins, *Regulating the Use of Force in Wars of National Liberation: The Need for a New Regime* (Nijhoff 2010) 97-102.

³²⁰ Christopher Greenwood, ‘A Critique of the Additional Protocols to the Geneva Conventions of 1949’ in Helen Durham and Timothy LH McCormack (eds), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (Martinus Nijhoff 1999) 235.

³²¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Geneva Protocol II) art 1(1) (emphasis added).

Rwelamira comments: 'Individual States are [...] left with a *carte blanche* to decide when the *Protocol* or common Article 3 should be invoked'.³²²

Another scenario where revolutionary may claim a privileged combatant status is an 'internationalised' armed conflict, that is when an internal armed conflict due to a number of factors transforms into an international armed conflict. There are three possibilities here: (1) a non-state actor may establish a new state in the course of the conflict; (2) a foreign state may intervene in support of a non-state entity against the state on the territory of which the conflict occurs; and (3) a foreign state may intervene against a non-state group without the consent of the host state.³²³ However, the practical usefulness of these scenarios is of a limited significance to revolutionary violence, since they are either dependent on the actual success of rebellion or on the involvement of the third state.

All in all, the relevance of the IHL framework for revolutions is rather meagre considering the fact that revolutions all too often either do not meet the threshold of a war or are deliberately characterised as such for the reasons of political convenience. Moreover, individual states tend to view the applicability of IHL within their domestic jurisdictions rather leniently, with broader government strategic considerations being of primary concern. Once the applicability of the laws of war is acknowledged, no derogation beyond military necessity and proportionality is generally allowed. This inability to derogate from humanitarian restrictions incites governments to react speedily and excessively to any show of insurgent force because 'the legal parameters for action when *military* necessity and proportionality are concerned require far higher standards of care than might otherwise be thought'.³²⁴ This notwithstanding, the provisions of humanitarian law on liberation movements are not without effect altogether. They reinforce the international standing of revolutions as liberation struggles against oppressive regimes in defence of self-determination and thereby implicitly recognise their legitimacy. State parties to Protocols I and II are now under an increased pressure to adhere to Geneva Conventions when faced with violent resistance.

6.3.5. Revolution as a Legal Remedy

Political scientists typically perceive the right of rebellion as a form of voice exercised by citizens in extreme circumstances. It is only to be resorted to in

³²² Medard R Rwelamira, 'The Significance and Contribution of the Protocols Additional to the Geneva Conventions of August 1949' in Christophe Swinarski (ed), *Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge — en honneur de Jean Pictet* (Martinus Nijhoff 1984) 236.

³²³ See Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmschurst (ed), *International Law and the Classification of Conflicts* (OUP 2012).

³²⁴ Elizabeth Chadwick, *Self-Determination in the Post-9/11 Era* (Routledge 2013) 45 (emphasis original).

cases of intolerable governmental abuse and ‘legal alienation’³²⁵ and when the normal channels of voice are not available or are ineffective. Most significantly, the right of revolution is to be claimed when fundamental human rights are reneged upon and when conventional remedies are compromised or non-existent. However, the legal status of revolution remains uncertain. For majority of legal scholarship, revolution is a simple fact unregulated by international law, less so is it a legal right. However, denying the right of resistance a legal standing in international law presents an ethical problem: if the right to revolution is simply non-existent, if rebellion is to be banned in all circumstances, how people are then expected to enjoy and vindicate their rights enlisted in a wide plethora of international instruments? Would not it then be better to accept that there are no human rights, that those items enshrined in the International Bill of Rights are merely political values to be superseded by more exigent considerations, such as international peace and stability? As Tony Honore pointedly noted,

Would it make sense to deny someone the right to do what he is compelled to do in the sense not of being coerced but of having no other means of vindicating his fundamental interests? To deny it would be to assert that people may be bound indefinitely to submit to conditions of life which we and they recognize as intolerable; that their interests may properly be disregarded and they themselves treated as unworthy of respect.³²⁶

Indeed, to deny revolution any legal status in international law is to assert that law is an instrument of oppression by virtue of juridical immortalisation of the effective status quo and complacency in injustices that such status quo may generate. To deny the right to revolution is to effectively accept that international law abandons people facing *en masse* grave human rights violations perpetrated by their governments. Grave and systematic state oppression dissolves the social bonds between state and its subjects and consequently ‘it is no longer open to state to define the conditions in which subjects may lawfully use force’.³²⁷ The importance of the right of revolution is also acknowledged by other scholars who compellingly insist that ‘[i]n certain circumstances, violence may be the last appeal [...] for some measure of human dignity’ and that denial of the right to resist injustices ‘can be tantamount to confirmation and reinforcement of those injustices’.³²⁸ The cause of this drastic action is so exigent that it ‘has been transformed into a

³²⁵ Roberto Gargarella, ‘The Last Resort: The Right of Resistance in Situations of Legal Alienation’ (2003) SELA Paper 23 <http://digitalcommons.law.yale.edu/yls_sela/23/> accessed 13 September 2016.

³²⁶ Tony Honore, ‘Right to Rebel’ (1988) 8 Oxford J Leg Stud 34, 43.

³²⁷ *ibid* 53-54.

³²⁸ Michael Reisman, ‘Private Armies in a Global War System: Prologue for Decision’ (1973) 14 VJIL 1, 32-33.

“right”.³²⁹ The intuitive appeal of this position is reinforced by Lauterpacht who postulates that:

[T]he international community was no longer a society for the mutual protection of established governments. A revolution might be a crime against the State, but it was no longer a crime against the international community. So long as international society did not effectively guarantee the rights of man against arbitrariness and oppression by governments, it could not oblige States to treat subversive activities [...] as a crime.³³⁰

It follows that there must be a right to rebel. It might not be a formal legal right in the sense that it lacks a solid foundation either in treaty law or custom, but neither is it a purely moral entitlement. It holds a semi-formal status flowing from the notion of human dignity and international principles embodied in the human rights instruments.³³¹ It is quite astonishing that numerous scholars³³² similarly to Honore ended up to cautiously conclude that even though the right of resistance to tyranny is a part of the natural law tradition and its existence is presupposed by the very fact of possessing human rights and/or it is logical to imply the existence of this right by interpreting existing human rights undertakings, the status of the right in question is somewhat different from other rights by the fact that no international treaty text explicitly states it and state practice is close to non-existent. It is even more astonishing that no legal scholar considered a possibility to invoke the third source of law as a legal justification for the right of revolution.³³³

Because the right to revolution is a secondary right, that is it is only activated when other (primary) human rights have been abridged, it would be more logical to regard it as a safeguard or a remedy rather than as a full-fledged human right. The right of revolution cannot be other than the ultimate means of redress, the *ultimum remedium*.³³⁴ To claim otherwise would be to confuse

³²⁹ Gerald Sumida, ‘The Right of Revolution: Implications for International Law and Order’ in Charles A Barker (ed), *Power and Law: American Dilemma in World Affairs* (The John Hopkins Press 1971) 130.

³³⁰ ILC, Draft Code of Offences against the Peace and Security of Mankind (1954) 1 ILCYB 1, 141 (Comment by Lauterpacht).

³³¹ Tony Honore, ‘Right to Rebel’ (1988) 8 Oxford J Leg Stud 34, 43.

³³² See eg Gerald Sumida, ‘The Right of Revolution: Implications for International Law and Order’ in Charles A Barker (ed), *Power and Law: American Dilemma in World Affairs* (The John Hopkins Press 1971) 132-33 (‘There is no explicitly defined right of revolution in contemporary international law [...] Yet, this right, formulated as the natural law doctrine of the right of resistance to a tyrannical ruler, is an inherent part of the philosophical tradition from which traditional international law evolved and which provides a large measure of its theoretical underpinnings’).

³³³ This statement does not concern a small number of scholars positing that the right to resist authoritarian and repressive governments is in and of itself a general principle of law (section 6.3.3) or those opining that the right to revolution is a progeny of the broader concept of the personal self-defence, which, in its turn, can be viewed as a general principle of law recognised by civilised nations (section 6.3.2.1).

³³⁴ See Tran Van Minh, ‘Political and Juridical Sanctions against Violations of Human Rights’ in UNESCO, *Violations of Human Rights: Possible Rights of Recourse and Forms of Resistance*

cause and effect. The Preamble of the UDHR by asserting that ‘it is essential, if man is not to be compelled to have recourse, as a *last resort*, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law’³³⁵ confirms this view.

Thus, the most robust legal justification for the right to revolution lies in the third source of international law, namely ‘general principles of law recognised by civilised nations’. As established previously, general principles have generally been considered vague, ambiguous and non-consensual and consequently were almost never explicitly referred to as a legal justification for action. Instead, international courts attempted to couch their reasoning in terms of customary international law or simply referred to ‘general international law’ in contrast to treaty law.³³⁶ Such cautious an approach that renders general principles a status of a subsidiary source, an afterthought conceived to prevent a *non liquet*, is generally understandable given the voluntaristic underpinnings of classical legal doctrine. And yet, nowhere in the drafting history of the statutes of the PCIJ and the ICJ is there any justification for such a hierarchy of sources. Moreover, with the expanding constitutionalisation of international law ‘there will doubtless be greater reliance on international law as a means to resolve a variety of issues which neither conventional nor customary international law is ready to meet’.³³⁷ This means that general principles of international law are increasingly invoked as a self-standing source of rights and obligations.

The principle *ubi ius, ubi remedium* is an equitable principle meaning that for every wrong committed there must be an adequate remedy. It was stated in as early as 1646 by Grotius in his *De Jure Belli ac Pacis* that ‘fault creates the obligation to make good the loss’.³³⁸ While the exact scope of this principle is not clear, it does not, in the words of Burke, entail automatic *restitutio in integrum* for every wrong committed. Instead, it falls under the equity’s *praeter legem* function, which is to fill the lacunae of international law and to obviate a *non-liquet*.³³⁹ Thus, the most evident application of this principle ensues when there is a positive right conferred upon individual and when the

(Imprimerie des Presses Universitaires de France 1984) 163; Shannonbrooke Murphy, ‘The Right to Resist Reconsidered’ in David Keane and Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar 2012) 110 (The right to revolution ‘falls into the smaller category of “rights as remedies” and is not an end unto itself’).

³³⁵ Universal Declaration of Human Rights, UNGA Res 217(III)A (10 December 1948) preamble (emphasis added).

³³⁶ See *North Sea Continental Shelf Cases (Federal Republic of Germany v Netherlands; Federal Republic of Germany v Denmark)* (Merits) [1969] ICJ Rep 3, 28, para 37; *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Merits) [1970] ICJ Rep 3, 32, para 34; *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Merits) [1980] ICJ Rep 3, 31, para 62.

³³⁷ Cherif Bassiouni, ‘A Functional Approach to “General Principles of International Law”’ (1990) 11 MJIL 768, 769.

³³⁸ Cited in Lee T Luke, ‘The Right to Compensation: Refugees and Countries of Asylum’ (1986) 80 AJIL 532, 536.

³³⁹ Ciaran Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013) 302.

realisation of this right is dreadfully compromised if there is no remedy to protect it when it is violated.

Even though the status of this principle in international law is obscure, international courts and tribunals had a chance to pronounce themselves on the principle in some of their cases. In the *Spanish Zone of Morocco Claims*, regarding 51 claims by British subjects or British-protected persons against the Spanish authorities for significant damage to life and/or property in the Spanish zone of Morocco during the riots of the 1920s, it has been asserted that ‘responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation’.³⁴⁰ The significance of this case is underscored by the fact that it served as one of the major precedents in the International Law Commission’s work on state responsibility. Further, in the landmark 1928 *Chorzow Factory* case, involving Polish exploitation of German-owned industrial property within the territory of Poland and the eventual damage suffered by German companies, the PCIJ stated that ‘reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself [...] [it is] a general conception of law that any breach of an engagement involves an obligation to make reparation’.³⁴¹ Thus, in the opinion of the Court, it is a principle of international law that any breach of an obligation involves a duty to make reparation. For Burke, this was a breakthrough statement ‘as it assumed and implied power of the Court [...] to create a remedy where none was explicitly provided for’.³⁴² The successor of the PCIJ, the ICJ, acknowledged this principle in its advisory opinion in the *Reparation for Injuries* case by affirming the capacity of the United Nations to claim reparation for the injuries caused to its agents by the responsible *de jure* or *de facto* government.³⁴³ In this case, the Court assumed a rather broad interpretation of the UN Charter with a view to obtain an equitable result. As Rossi noted, the Court subscribed to a teleological interpretation of the Charter and other international instruments ‘to avoid the manifestly unreasonable result that otherwise would have obtained’.³⁴⁴ This view was again reiterated in 1973 in the separate opinion of Judge Ammoun, who postulated that the obligation to make reparation for injury caused by fault was ‘one, if not indeed the most important, of the principles common to nations in the sense of Article 38, paragraph 1 (c) of the Court’s Statute’.³⁴⁵

³⁴⁰ *Spanish Zone of Morocco Claims (Great Britain v Spain)* (1924) 2 RIAA 615, 641.

³⁴¹ *Case Concerning the Factory at Chorzow (Merits)* [1928] PCIJ Series A 17, 29.

³⁴² Ciaran Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013) 217.

³⁴³ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174.

³⁴⁴ Christopher R Rossi, *Equity and International Law: A Legal Realist Approach to International Decision Making* (Transnational Publishers Inc 1993) 173-74.

³⁴⁵ *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* (Advisory Opinion) Separate Opinion of Vice-President Ammoun [1973] ICJ Rep 166, 247.

Yet, the most emblematic case in terms of the applicability of *ubi ius, ubi remedium* in international law is the ICJ's landmark decision in the *Barcelona Traction* case.³⁴⁶ The case concerns the Barcelona Traction, Light and Power Company, Limited which was incorporated in 1911 in Toronto (Canada). It created a number of subsidiary companies with a view to ensure electric power production and supply in Catalonia, Spain. By 1936, the subsidiary companies provided for the major electricity distribution in Catalonia. Some time later, Barcelona Traction's share capital came to be largely held by Belgian nationals. After the Spanish civil war, the company faced difficulties in acquiring foreign capital for resuming business. The company was eventually declared bankrupt without proper notification, which resulted in the forfeiture of the right to enter a plea of opposition. As a result of the arguably unfair and non-transparent bankruptcy proceedings, representations were made to the Spanish Government by the British, Canadian, United States and Belgian Governments. When Canada in 1955 ceased its interposition, it was Belgium that maintained its objections and eventually brought the case to the ICJ.

When assessing the Belgian Government's *jus standi* in exercising diplomatic protection of company on behalf of its shareholders, the Court observed that the right of diplomatic protection was originally conceived as a means to protect natural persons rather than corporate entities. However, the Court recognised that in the field of diplomatic protection, international law was in continuous evolution and where it was a question of an unlawful act committed against a foreign company, national state of the company could exercise diplomatic protection for the purpose of seeking redress. In other words, it was solely Canadian government that had *locus standi* to exercise protection over Barcelona Traction. The importance of this case lies in the fact that Court recognised that the interests of justice required the extension of the right to diplomatic protection to juristic entities in order to ensure that the right (of shareholders) is followed by remedy.

The fact that the Court has never had an occasion to apply this principle to the situation where people's right to democracy was abridged by the action of their government does not mean that remedy in such situations is non-existent. As Burke has astutely observed, the Court does not create remedies. Rather, it discovers already extant remedies which exist independently of the Court's judgments.³⁴⁷ Just because scholars do not have courage to invoke principles that were not previously referred to by the World Court in its decisions does not impact their normativity. Consequently, the ambit of application of the principle of *ubi ius, ubi remedium* is wider than what the Court had an occasion to define and can encompass situations not hitherto envisaged.

The right to vote and stand for elections, which is argued in the preceding chapters to effectively constitute the right to democracy, is recognised in a

³⁴⁶ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Merits) [1970] ICJ Rep 3.

³⁴⁷ Ciaran Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013) 303-04.

variety of international and regional instruments, not to mention national constitutions of states. The most notable example is article 25 ICCPR. Despite the solid foundation of this right in treaty law, the protection of right concerned in case of violation remains blatantly inadequate, albeit not completely non-existent. The so-called pro-democratic interventions, whether unilateral or collective, in, *inter alia*, Grenada (1983), Panama (1989), Haiti (1994), Sierra Leone (1996) and Libya (2011) as well as less intrusive responses by the international community to democratic threats in the form of election monitoring, non-recognition of the incumbent governments, suspension of aid and/or suspension from the membership of the international organisation in Angola (1992-1993), Guatemala (1993), Cambodia (1991-1998), Paraguay (1996), Pakistan (1999), Venezuela (2002) and more recently in Honduras (2009) and Madagascar (2009) are all evidences of the attempt of the international community to remedy the violations of democratic principles.

However, there are many similar cases of offences against democracy that were flagrantly condoned by the community of states. For instance, the SC condemnation, non-recognition, economic embargo and eventually the authorisation of military force against Haiti's *de facto* government in the aftermath of the 1991 putsch was taking place in parallel with a general non-reaction to the Algerian military coup occurring the year later. Moreover, the so much celebrated pro-democratic intervention in Sierra Leone in 1996 as an indication of the development of the democratic entitlement occurred against the backdrop of the total international condonation of the military coup in Nigeria just three years earlier. The world history of military coups is abundant with similar inconsistencies.³⁴⁸ This makes the right to democracy utterly vulnerable and dependent on political will and strategic interests of third states, which compromises its effectiveness to the extent that one may easily conclude that no effective remedy exists in such situations. However, as the above-examined jurisprudence of the World Court elucidates, every right has a remedy by virtue of a general principle of *ubi ius, ubi remedium* — that equity will not suffer a wrong to be without remedy. When democratic rights of people are blatantly abridged by power-greedy cliques, few would object to the egregious violation of international human rights law, not to mention evident wrongfulness and injustice, that ensue. Such illegality, coupled with moral injustice, may call into play the maxim *ubi ius, ubi remedium*. The practical implication of this maxim is that people, instead of passively waiting for the action by the international community to remove the self-proclaimed government and vindicate their right to democracy, can take action by themselves by instigating a revolution against undemocratic government if no other means proved effective. Moreover, considering the fact that revolutions are not outlawed in international law it follows that the application of the principle that for every wrong committed there should be a remedy to these

³⁴⁸ See Mikulas Fabry, 'The Right to Democracy in International Law: A Classical Liberal Reassessment' (2009) 37 *Millennium J Int'l Stud* 721, 735-36; Megan Shannon and others, 'The International Community's Reaction to Coups' (2015) 14 *Foreign Pol Anal* 363.

situations does not conflict with any existing international legal rule. Here, one must remind oneself of the Lotus principle ‘everything which is not expressly prohibited in international law is allowed’.³⁴⁹ Whilst to say that the absence of any express prohibition of revolution in international law is not to affirm the latter’s status as a right, the general permissibility of revolution in international law coupled with its inalienability for realisation of fundamental human rights, including the right to democracy, and the existence of the general principle mandating remedy for every violation committed provide in tandem a strong case for revolution as a right, albeit of a secondary, remedial character.

Following this analysis, the equitable principle *ubi ius, ubi remedium* provides solid legal support for the right to revolution as a legal remedy against democratic disruptions. Yet, because the content of the principle as well as precise modalities of its application are highly ambiguous, one cannot claim that the right to revolution is a *human* right on the sole basis thereof. This is exacerbated by the fact that the World Court has never pronounced itself on the issue of the right to revolution as a remedy in its jurisprudence. Even though it is agreed that the principle is general in nature and can, therefore, be applied to situations not considered by the Court, one should be careful in drawing far-going conclusions from the claims, which find little support in state practice, attract contradictory scholarly opinions and have never been tested in the courtroom. Moreover, the application of the principle that for every wrong committed there should be a remedy implies a secondary status of the right to revolution: the latter is a derivative of human rights, in that respect for human rights and their effective enforcement rely on it, without being a human right itself. It exists in the shadow of the more conventional human right to an effective remedy for human rights violations. This builds on the consideration that governments, aware of the risk of rebellion by their citizens, may be more prone to adhere to their human rights obligations. If they do, the right to revolution is never justifiable. This effectively means that the right to revolution, albeit sharing some of the characteristics of a human right (including the goal of curbing state power), differs from conventional human rights in certain critical aspects. First, unlike traditional human rights, the right to revolution does not protect any objective values stemming from human dignity, such as life, physical integrity, equality, participation and the like. Instead, it seeks to protect these objective values against unlawful attack. It is, thus, auxiliary in nature, seeking to maximise protection for other rights that protect objective values. Second, because the right to revolution implies violence against the state and fellow citizens, it can only be a measure of last resort, when conventional remedies cannot be applied effectively. Otherwise, it would represent an unjustified violation of other human rights. In this sense, it assumes a second-order status not only with respect to human rights but also in relation to other remedies aimed to counter human rights violations. All in

³⁴⁹ *The Case of the S.S. ‘Lotus’ (France v Turkey)* (Merits) [1927] PCIJ Series A No 10.

all, it is fair to conclude that by virtue of the auxiliary nature, the right to revolution is a right *sui generis* in international law.³⁵⁰

6.3.6. ‘Illegal but Justifiable Revolution’?

In failing to recognise a right to resistance even in the gravest circumstances, international law divests itself of the cloak of moral legitimacy from which it ultimately derives its force.³⁵¹

The status of a right *sui generis* is rather dubious in international legal doctrine. From the traditional viewpoint, international law is binary: the claim is either legal by virtue of being rooted in one of the recognised legal sources (*lex lata*) or is relegated to the category of non-law (*lex ferenda*). The soundness, authoritativeness and persuasiveness of legal argument ultimately depends on how firmly it is based on *lex lata*. The *sui generis* second-tier status of the right to revolution lies somewhere in between: it is neither legal in the same sense as other human rights are, nor is it a mere moral aspiration. It is grounded in natural law but draws its legitimating force from the existing principles of both international law and national constitutional orders. Because such ‘oscillating’ position cannot be defended within traditional legal doctrine, a novel approach is needed. One possibility to conceptualise the *sui generis* character of the right to revolution is to suggest that revolution is ‘illegal but justifiable’. The formula ‘illegal but justifiable’ mirrors a general tendency of the increasing invocation of the legitimacy narrative in the debate on the use of violence for the cause of humanitarian values. This builds on the consideration that legitimacy (moral imperatives, political feasibility) may at times override legality (compliance with legally binding rules) and to ensure the ongoing relevance and authority of international law a so-called ‘illegal but justifiable’ approach is necessary. In what follows, the theoretical underpinnings of the formula of ‘illegal but justifiable’ are clarified by reference to the substantive conception of legitimacy. Thereafter, the formula is applied to revolutions to elucidate and legitimate the latter’s extraordinary status.

6.3.6.1. Conceptualising Legitimacy in International Law: From Procedural to Substantive Conception

Legitimacy is one of the most used and abused concepts in social sciences. On the one hand, the legitimacy talk is inevitable as it introduces constructive flexibility into otherwise rigid normative frameworks. On the other hand, its semantic ambiguity has been used strategically to advance subjective

³⁵⁰ This was also recognised by Aleksandr Marsavelski, ‘The Crime of Terrorism and the Right of Revolution in International Law’ (2013) 28 Conn J Int’l Law 241, 246-47.

³⁵¹ Jan Arno Hessbruegge, *Human Rights and Personal Self-Defence in International Law* (OUP 2017) 333.

preferences and political expediency. Because legitimacy has been ascribed different meanings by different authors depending on contextual ramifications and authors' subjectivities, it has been asserted that it lacks normative content.³⁵² This resulted in the legitimacy discourse being 'neglected',³⁵³ 'ignored',³⁵⁴ 'fallen out of favour',³⁵⁵ 'under-scrutinised',³⁵⁶ or still remaining 'in its infancy'.³⁵⁷ Yet, following the publication of Thomas Franck's renowned work on legitimacy in 1990,³⁵⁸ there has been an explosive upsurge of interest in the concept in international relations and international law.³⁵⁹

To begin, legitimacy can be understood as *word*, *concept* and *conception*.³⁶⁰ As a word, it acquired a variety of meanings over time and space and it can refer to different concepts at the same time. As a concept, legitimacy encapsulates a certain idea of what may be perceived as 'legitimate', which can be expressed through different conceptions. A particular conception of legitimacy refers to its content, which may be associated with justice, morality, equity, effectiveness etc., and specifies the criteria to be met by the rule or decision in order to qualify as legitimate. The majority of literature is concerned with specific conceptions of legitimacy, the most common typology being procedural and substantive legitimacy.³⁶¹ The term 'legitimacy'

³⁵² Martti Koskeniemi, 'Miserable Comforters: International Relations as New Natural Law' (2009) 15 EJIR 395, 409.

³⁵³ John R Vincent and Peter Wilson, 'Beyond Non-Intervention' in Ian Forbes and Mark Hoffman (eds), *Political Theory, International Relations and the Ethics of Intervention* (Palgrave Macmillan 1993) 129.

³⁵⁴ John Williams, 'Nothing Succeeds Like Success? Legitimacy in International Relations' in Barry Holden (ed), *The Ethical Dimensions of Global Change* (Palgrave Macmillan 1996) 40.

³⁵⁵ Michael N Barnett, 'Bringing in the New World Order: Liberalism, Legitimacy, and the United Nations' (1997) 49 Wld Pol 526, 529.

³⁵⁶ Christopher A Thomas, 'Uses and Abuses of Legitimacy in International Law' (2014) 34 OJLS 729, 729.

³⁵⁷ Jean-Marc Coicaud, 'International Democratic Culture and Its Sources of Legitimacy: The Case of Collective Security and Peacekeeping Operations in the 1990s' in Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organisations* (United Nations UP 2001) 260.

³⁵⁸ Thomas Franck, *The Power of Legitimacy Among Nations* (OUP 1990).

³⁵⁹ See eg Rudiger Wolfrum and Volker Rothen, *Legitimacy in International Law* (Springer 2008); Lukas H Meyer, *Legitimacy, Justice and Public International Law* (CUP 2009); Jutta Brunnee and Stephen J Toope, *Legitimacy and Legality in International Law* (CUP 2010); Hilary Charlesworth and Jean-Marc Coicaud, *Fault Lines of International Legitimacy* (CUP 2010); Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart 2010).

³⁶⁰ Arthur Isak Applbaum, 'Legitimacy in a Bastard Kingdom' (2004) Center for Public Leadership Working Paper 5/2004, 76 <https://dspace.mit.edu/bitstream/handle/1721.1/55927/CPL_WP_04_05_Applbaum.pdf?sequence=1> accessed 16 February 2017. See also Wilfried Hinsch, 'Legitimacy and Justice: A Conceptual and Functional Clarification' in Jörg Kuhnelt (ed), *Political Legitimization without Morality?* (Springer 2008) 39.

³⁶¹ The third common conception is an outcome-based legitimacy which evaluates the object of legitimation in terms of a specific set of outcomes that are considered desirable. This conception is not relevant for the present work and will not be discussed further. On a more detailed overview of procedural, substantive and outcome-based legitimacy, see Thomas Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 17-18; Ian Clark, *Legitimacy in International Society* (OUP 2007) 18-19; Victor Bekkers and Arthur Edwards, 'Legitimacy and Democracy:

etymologically stems from the Latin *legitimus*, meaning ‘lawful’. Thus, legitimacy has historically been understood as ‘conformity to law, rule or principle; lawfulness, conforming to sound reasoning, logicity’.³⁶² Such ‘procedural legitimacy’, as is famously defended by Thomas Franck,³⁶³ refers to mechanisms by which power is assigned and exercised. It is concerned with the formal validity of authority which is established by secondary rules about making, altering and invalidation of laws.³⁶⁴ As Franck has put it, ‘[a] process, in this sense, is usually set out in a superior framework of reference, rules about how laws are made, how governors are chosen and how public participation is achieved’.³⁶⁵ In his procedural conception of legitimacy, legitimacy is measured by criteria of coherence, consistency, adherence and symbolic validation.³⁶⁶ Moreover, the notion of procedural legitimacy lies at the heart of legal positivism, since law is to be obeyed notwithstanding its substance: ‘[I]ts background norms are often taken for granted and its procedures are followed for their own sake without deeper consideration of whether they are serving a more fundamental substantive aim or resulting in the best outcomes’.³⁶⁷ Procedural legitimacy is, thus, a constitutive element of legality (law rationality): it strengthens legality and enhances its compliance pull. This conception is the one which is favoured mostly in international legal circles and understandably so since this is the safest position on legitimacy which an orthodox lawyer can take to retain its legal identity and ‘culture of formalism’.³⁶⁸

However, in recent discourse legitimacy increasingly assumes a dichotomous relationship with legality.³⁶⁹ By being assimilated to morality,

A Conceptual Framework for Assessing Governance Practices’ in Victor Bekkers and others (eds), *Governance and the Democratic Deficit: Assessing the Democratic Legitimacy of Governance Practices* (Ashgate 2007) 35, 44-45; Rudiger Wolfrum and Volker Roeben, *Legitimacy in International Law* (Springer 2008) 6; Christopher A Thomas, ‘Uses and Abuses of Legitimacy in International Law’ (2014) 34 OJLS 729, 749.

³⁶² *Shorter Oxford English Dictionary* (4th edn, OUP 1993) 1562.

³⁶³ See Thomas M Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 16-19 (Legitimacy is ‘a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively’; it is ‘the perception of those addressed by a rule or a rule-making institution that the rule or institution has come into being and operates in accordance with generally accepted principles of right process’); Thomas M Franck, *Fairness in International Law and Institutions* (OUP 1995) 7-9 (Depicting legitimacy as being ‘primarily procedural’ in contrast to distributive justice which is ‘primarily moral’).

³⁶⁴ Christopher A Thomas, ‘Uses and Abuses of Legitimacy in International Law’ (2014) 34 OJLS 729, 750.

³⁶⁵ Thomas Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 17.

³⁶⁶ *ibid.*

³⁶⁷ Christopher A Thomas, ‘Uses and Abuses of Legitimacy in International Law’ (2014) 34 OJLS 729, 751.

³⁶⁸ The expression is from Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (CUP 2002) 502-09.

³⁶⁹ Tetsuo Sato, ‘The Legitimacy of the Security Council Activities under Chapter VII of the UN Charter since the End of the Cold War’ in Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organisations* (United Nations UP 2001) 340; James Crawford, ‘The Problems of Legitimacy-Speak’ (2004) 98 ASIL Proc 271, 271; Anthea Roberts, ‘Legality

fairness, equity and other substantive values, the novel legitimacy rhetoric – what has been dubbed as ‘substantive legitimacy’ – is concerned with the aim served by the object of legitimation, such as justice, human rights, development, global welfare and other extra-legal standards.³⁷⁰ It is a source of meta-legal authority standing for values which are to be privileged at any one moment irrespective of their positive underpinnings. The need to invoke substantive legitimacy is largely occasioned by the growing complexity and fragility of world order, increasing globalisation, interdependence and attendant homogenisation of values and emergence of common interest. As Clark pointedly observed, ‘once again, after decades of structural orthodoxy, ideas are thought to matter’.³⁷¹ It is, hence, logical to suggest that, by virtue of the focus on ‘non-consensual’ elements within international law, substantive legitimacy and global constitutionalism are two sides of the same coin.³⁷²

The increasing appeal to the language of substantive legitimacy implies that existing international law is somewhat deficient and incapable of response to a perceived urgency. Particularly after the NATO’s military action in Kosovo in 1999, it is commonly accepted that when the law is unjust, obsolete or fails some wider test about ultimate moral principles, legitimacy has to assume a corrective function. It ‘watches over laws, ensuring that they serve their fundamental purpose – to improve the lives of those they govern’ and serves to correct legality when necessary.³⁷³ In this sense, substantive legitimacy introduces constructive flexibility in international law in situations when blind following of legal rules may reinforce injustices. Ideally, legitimacy and legality go hand in hand. However, such unity is not always present and is well illustrated by the fact that global recognition of human rights in international instruments may be hampered by national laws and policies of individual governments which cover their oppressive actions with the mantra of legality. Such ‘oppressive legality’ may work for a certain period of time until it ‘reaches such an intolerable level that the law, as an “unjust

v Legitimacy: Can Uses of Force Be Illegal but Justified?’ in Philip Alston and Euan Macdonald (eds), *Human Rights, Intervention, and the Use of Force* (OUP 2008) 206-08.

³⁷⁰ See eg Ernst-Ulrich Petersmann, ‘The WTO Constitution and Human Rights’ (2000) 3 JIEL 19; Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations of International Law* (OUP 2004); Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton UP 2007); Allen Buchanan and Robert O Keohane, ‘The Legitimacy of Global Governance Institutions’ in Rudiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008).

³⁷¹ Ian Clark, ‘International Legitimacy’ in Ian Clark (ed), *Legitimacy in International Society* (OUP 2007) 12.

³⁷² One should not, however, be confused by such conceptual affinity. Whereas substantive legitimacy is concerned with integrating moral imperatives into the ethically neutral legal discourse, global constitutionalism depicts the process of transformation of international law towards a system more easily responsive to global needs.

³⁷³ Vesselin Popovski and Nicholas Turner, ‘Legality and Legitimacy in International Order’ (2008) Policy Brief 5/2008, 1 <<http://archive.unu.edu/publications/briefs/policy-briefs/2008/pb05-08.pdf>> accessed 3 November 2016.

law”, has to yield place to justice’.³⁷⁴ Substantive legitimacy is, thus, often equated with justice and/or morality. However, it is more pertinent to speak of the substantive conception of legitimacy as the one concerned with morality only since ‘legitimacy is a less-demanding standard than justice in the sense that an institution can be legitimate though not fully just’.³⁷⁵ Hence, legitimacy claims may facilitate moral evaluations of particular acts even where consensus on justice is lacking.

Yet, some authors distinguish between legitimacy and morality. For Thomas Franck, these are to be differentiated as process and substance respectively. He explains that ‘[t]he legitimacy-based claim [...] derives from a *secular* political community’s preference for, and dependence on, order and predictability. The identical-appearing justice-based claim, in contrast, derives from the belief of a community of *shared moral values*’. He further states that ‘[i]n a community of moral values, promises are sacred because trust and reciprocity are believed to be instrumental in advancing not order, but *fairness*’.³⁷⁶ On this account, legitimacy is about predictability and order and stands as a counterpoint to justice as fairness, or morality. This view notwithstanding, the contemporary debate on legitimacy tends to avoid this separation. The most obvious example is the 1999 Kosovo’s crisis, when the military intervention occurred in violation of the law of the use of force. Because the SC authorisation was impeded by Russian and Chinese vetoes, the strict adherence to legality would be equivalent to a passive condoning of ethnic cleansing in Kosovo. The NATO opted for an illegal but morally justified use of force. The response of the international community was largely supportive and crystallised the hitherto ambiguous formula of ‘illegal but legitimate’.³⁷⁷ Not only did this precedent mark a major milestone in

³⁷⁴ Gustav Radbruch, ‘Gesetzliches Unrecht und übergesetzliches Recht’ in Gustav Radbruch (ed), *Rechtsphilosophie. Studienausgabe* (First published 1946, CF Muller 1999) 211-19.

³⁷⁵ Allen Buchanan, ‘The Legitimacy of International Law’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 81. See also Wilfried Hinsch, ‘Legitimacy and Justice: A Conceptual and Functional Clarification’ in Jörg Kuhnelt (ed), *Political Legitimization without Morality?* (Springer 2008) 43-44.

³⁷⁶ Thomas M Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 234 (emphasis original).

³⁷⁷ The Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000) 4 (‘The Commission concludes that the NATO military intervention was illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule’). See also Antonio Cassese, ‘*Ex iniuria ius oritur*: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the International Community?’ (1999) 10 EJIL 23, 30; Bruno Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 EJIL (1999) 1, 1-22. For particularly useful discussions of the international lawyers’ reactions, cf Siegfried Schieder, ‘Pragmatism as a Path towards a Discursive and Open Theory of International Law’ (2000) 11 EJIL 663, 691-98 and Olivier Corten, ‘Les ambiguïtés de la référence au droit international comme facteur de légitimation portée et signification d’une deformalisation du discours

international relations by incorporating the concept of substantive legitimacy into the fabric of international law through the 'illegal but legitimate' approach³⁷⁸ but it also crystallised a *moral* difference, or gap, between legality and legitimacy as the one between what legality requires and what morality demands.³⁷⁹ The Commission on Kosovo itself situated the 'illegal but legitimate' approach in an ambiguous grey zone between an extension of international law and a proposal for an international moral consensus: 'In essence, this grey zone goes beyond strict ideas of legality to incorporate more flexible views of legitimacy'.³⁸⁰ This was reaffirmed by Franck, who argued in his later works that 'necessity and common sense have a role in tempering the law, in narrowing the gap between legality and legitimacy, between the letter of the law and its spirit, between normativity and morality'.³⁸¹ He described the gap as one between 'strict legal positivism and a common sense of moral justice'.³⁸² Similarly, Buchanan designated legality and legitimacy as fidelity to law and fidelity to basic moral values.³⁸³ Falk, the then member of the Independent International Commission on Kosovo (IIC), restated the issue in even more subtle manner. He stated that the war in Kosovo 'while technically illegal, was politically and morally legitimate'.³⁸⁴ In this sense, substantive legitimacy was equated to morality. Thus reconfigured, the campaign might not have been legal, properly so called, but could be sanctioned by its compelling moral purpose.

The post-Kosovo legitimacy talk occasioned a strong backlash from eminent international lawyers. The turn to substantive legitimacy was dubbed

légaliste' in Corten and Delcourt (eds), *Droit, légitimation et politique extérieure. L'Europe et la guerre du Kosovo* (Bruylant 2000) 223-59.

³⁷⁸ See also Anthea Roberts, 'Legality v Legitimacy: Can Uses of Force Be Illegal but Justified?' in Philip Alston and Euan Macdonald (eds), *Human Rights, Intervention, and the Use of Force* (OUP 2008) 206.

³⁷⁹ Following the Kosovo war, the majority of the scholarly community acknowledged a moral gap between legality and legitimacy which had to be remedied. See eg Nicholas J Wheeler, 'Reflections on the Legality and Legitimacy of NATO's Intervention in Kosovo' in Ken Booth (ed), *The Kosovo Tragedy: The Human Rights Dimensions* (Franck Cass 2001) 145; Thomas Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (CUP 2002) 182; Richard Falk, *The Great Terror War* (Arris Books 2003) xvi; Allen Buchanan, 'Reforming the International Law of Humanitarian Intervention' in JL Holzgrefe and Robert O Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (CUP 2003) 131 (After the Kosovo campaign, that there is an 'unacceptable gap between what international law allows and what morality requires' is perfectly understandable).

³⁸⁰ The Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000) 164.

³⁸¹ Thomas Franck, 'Legality and Legitimacy in Humanitarian Intervention' in Terry Nardin and Melissa S Williams (eds), *Humanitarian Intervention* (NYU Press 2006) 237.

³⁸² Thomas Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (CUP 2002) 182.

³⁸³ Allen Buchanan, 'Reforming the International Law of Humanitarian Intervention' in JL Holzgrefe and Robert O Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (CUP 2003) 131.

³⁸⁴ Richard Falk, *The Great Terror War* (Arris Books 2003) xvi.

as the ‘turn to ethics’³⁸⁵ seeking to supplant legal discourse: ‘[I]t has been applied as a loose substitute for “legality” and as an emancipation from ‘disciplinary constraints’ of legal science.³⁸⁶ Another criticism concerns legitimacy’s semantic ambiguity characterised by the lack of normative content despite legitimacy’s claims to do so: it ‘is not about normative substance. Its point is to *avoid* such substance but nonetheless to uphold a *semblance* of substance’.³⁸⁷ Strongly related to this is an assumption that if legitimacy is indeed imprecise and there is no undisputed authority mandated to assess it,³⁸⁸ it is easily susceptible to abuse by (predominantly powerful) states following their egoistic, short-handed interests. In this sense, the modern turn to legitimacy is less about ‘the turn to ethics’ and more about the turn to empire, since it is typically powerful actors possessing means and expertise who are capable of imposing their understanding of the legitimate upon the international community.³⁸⁹

However, to say that the modern legitimacy talk shifts legal discourse to the periphery is to misunderstand the close relationship between the two. Many orthodox lawyers assert that the concepts of legality and legitimacy are synonymous and should remain such: what is legitimate is what law requires and vice versa.³⁹⁰ However, if this is the case, the concept of legitimacy is essentially redundant, and one might exclusively speak of conformity to law.³⁹¹ Additionally, international practice evidences that the use of legitimacy vocabulary implies its distinctiveness from legality. For example, in the context of the Iraq war it has been asserted that ‘[l]awful and legitimate are not

³⁸⁵ Martti Koskenniemi, “‘The Lady Doth Protest Too Much’: Kosovo, and the Turn to Ethics in International Law” (2002) 65 MLR 159. See also Martti Koskenniemi, ‘Formalism, Fragmentation, Freedom: Kantian Themes in Today’s International Law’ (2007) 4 NoFo 7, 16 (Claiming that the legitimacy rationale has been introduced merely to ‘ensure a warm feeling in the audience’).

³⁸⁶ James Crawford, ‘The Problems of Legitimacy-Speak’ (2004) 98 ASIL Proc 271, 271.

³⁸⁷ Martti Koskenniemi, ‘Miserable Comforters: International Relations as New Natural Law’ (2009) 15 EJIR 395, 409 (emphasis original). See also James Crawford, ‘The Problems of Legitimacy-Speak’ (2004) 98 ASIL Proc 271, 271.

³⁸⁸ Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects* (Gullanders Bogtrykkeri 1999) 24.

³⁸⁹ Michael Byers and Simon Chesterman, ‘Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law’ in JL Holzgrefe and Robert O Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (CUP 2003) 195-98; Martti Koskenniemi, ‘International Law in Europe: Between Tradition and Renewal’ (2005) 16 EJIL 113, 122 (Arguing that all substantive universalism is imperialism); Emmanuelle Jouannet, ‘Universalism and Imperialism: The True-False Paradox of International Law?’ (2007) 18 EJIL 379, 382; Christine Chinkin, ‘Rethinking Legality/Legitimacy after the Iraq War’ in Richard Falk, Mark Juergensmeyer and Vesselin Popovski (eds), *Legality and Legitimacy in Global Affairs* (OUP 2012) 222, 229.

³⁹⁰ See eg Tom J Farer, ‘Humanitarian Intervention Before and After 9/11: Legality and Legitimacy’ in JL Holzgrefe and Robert O Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (CUP 2003) 68.

³⁹¹ Ian Clark, ‘Legitimacy and Norms’ in Ian Clark (ed), *Legitimacy in International Society* (OUP 2007) 210.

necessarily the same thing'.³⁹² Moreover, to insist on their complete identification is to disable an important instrument of international change. As Clark has pointedly observed, '[i]t is precisely the political space between the two concepts that contributes to normative change in international society, to refinements of international law, and to developments in actual state practice'.³⁹³ Legitimacy serves as an engine for redefining and reshaping legality, by appeal to other norms.³⁹⁴ Thus, recourse to a legitimacy rationale is not an abandonment of legal debate but a more subtle shift from a first-tier legal guidance to a second-tier framework. This brings in an important dimension into legal debate by giving an alternative to respect for international law, which is not a violation of international obligation, properly so called, but a more attenuated notion of 'legitimate' action where the resulting behaviour falls outside of the black-and-white framework of legal prescriptions and appeals to a *principled* setting of secondary regime of obligatory rules.³⁹⁵ As to the legitimacy's semantic ambiguity, it is imperative to note that it does not claim to have a predefined substance. Rather, the point of legitimacy is to bring additional avenues for debate over controversial conduct or norm instead of blindly embracing 'a posture of legal nihilism'.³⁹⁶ Surely, such conceptual flexibility is prone to abuse. However, how is this different with respect to international legality? In fact, legality is particularly subject to manipulation by powerful states.³⁹⁷ International practice shows the persistent pattern of conduct in violation of the first-order legal norms, 'thereby effectively blurring the distinction between violations and interpretations, treating "law" as a process of authoritative decision rather than a framework of rules'.³⁹⁸ In fact, legitimacy serves as a framework of more controlled criteria for the interpretation of legal rules with a view to adapting those to changing circumstances.

³⁹² Richard Norton-Taylor, 'Blair to Order Invasion Force This Month' *The Guardian* (Manchester, 8 October 2002) 12
<<https://www.theguardian.com/politics/2002/oct/08/uk.iraq1>> accessed 16 February 2017.

³⁹³ Ian Clark, 'Legitimacy and Norms' in Ian Clark (ed), *Legitimacy in International Society* (OUP 2007) 211.

³⁹⁴ *ibid.* See also Andrea Roberts, 'Legality v Legitimacy: Can Uses of Force Be Illegal but Justified?' in Philip Alston and Euan Macdonald (eds), *Human Rights, Intervention, and the Use of Force* (OUP 2008) 209-10 ('[L]egitimacy may be resorted to with a view to critiquing the law and progressively developing it').

³⁹⁵ Richard Falk, 'Introduction: Legality and Legitimacy. Necessities and Problematics of Exceptionalism' in Richard Falk, Mark Juergensmeyer and Vesselin Popovski (eds), *Legality and Legitimacy in Global Affairs* (OUP 2012) 8.

³⁹⁶ *ibid.* 10.

³⁹⁷ For a detailed account of this point, see Jack L Goldsmith and Eric Posner, *The Limits of International Law* (OUP 2005) 23-78.

³⁹⁸ Richard Falk, 'Introduction: Legality and Legitimacy. Necessities and Problematics of Exceptionalism' in Richard Falk, Mark Juergensmeyer and Vesselin Popovski (eds), *Legality and Legitimacy in Global Affairs* (OUP 2012) 14.

6.3.6.2. Applying the Substantive Conception of Legitimacy to Revolutions

The previous section has shown that the ‘illegal but justifiable’ formula is the product of the progressive march of the substantive legitimacy talk in international law. It encapsulates the second-order guidelines to remedy the inefficiency, limitless or obsolescence of the first-order norms without waiting for cumbersome formal lawmaking procedures to create an adjustment.³⁹⁹ The formula was crystallised by the Kosovo precedent in the context of humanitarian intervention aimed to advance human rights. At first blush, it seems dubious whether the formula is applicable to other cases where the strict following of legality may result in injustices, such as, for example, revolutions. On closer inspection, however, it becomes clear that the idea that an action may be illegal but legitimate is as old as international law itself. Human history abounds with examples when law was challenged because it was in contradiction with what morality strongly demanded. Consider, for instance, the Nuremberg Tribunal, whose legal underpinnings, both substantive and procedural, were dubious at best. While its creation and mandate were not explicitly authorised by law, its actions were widely considered as legitimate and were eventually followed by the adoption of appropriate laws, such as the 1949 Geneva Conventions and the Genocide Convention to ‘catch up’ with legitimacy demands.⁴⁰⁰ Consider also the international practice of extradition of political offenders, which entailed granting of immunity to individuals who committed a political offence in an enemy state. Whilst it has never been legally established what the qualifier ‘political’ meant, the implicit requirement was that the political offender would be committed to the legitimate cause, namely that of fighting against oppression.⁴⁰¹ Thus, legitimacy shaped the conceptual ramifications of legality. Another case of ‘illegal but justifiable’ approach is the *Corfu Channel* judgment concerning the unilateral minesweeping operation by the UK in Albanian waters after mines damaged its warships. Whilst the Court confirmed illegality of Britain’s conduct, the only remedy it gave was a declaration of illegality.⁴⁰² In other words, legitimacy mitigated state responsibility. The 1999 Kosovo crisis provided the hitherto implied legitimacy rationale with the mantra of explicit

³⁹⁹ *ibid* 10.

⁴⁰⁰ See eg Guenael Mettraux, *Perspectives on the Nuremberg Trial* (OUP 2008) 832; Kirsten Sellars, ‘Imperfect Justice at Nuremberg and Tokyo’ (2011) 21 EJIL 1085.

⁴⁰¹ See Christine Van den Wijngaert, *The Political Offense Exception to Extradition: The Delicate Problem of Balancing the Rights of the Individual and the International Public Order* (Kluwer 1980) 18; Vincent DeFabo, ‘Terrorist or Revolutionary: The Development of the Political Offender Exception and Its Effects on Defining Terrorism in International Law’ (2012) 2 AU Nat’l Sec L Brief 69, 70.

⁴⁰² *The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v Albania)* (Merits) [1949] ICJ Rep 4, 36 (‘Gives judgment that by reason of the acts of the British Navy in Albanian waters in the course of the Operation of November 12th and 13th, 1946, the United Kingdom violated the sovereignty of the People’s Republic of Albania, and that this declaration by the Court constitutes in itself appropriate satisfaction’).

international acceptance. Importantly, the IIC itself acknowledged the relevance of the ‘illegal but legitimate’ approach for situations other than humanitarian intervention.⁴⁰³

In addition, it is fair to suggest that there is no moral distinction between the doctrine of humanitarian intervention and revolution since both are undertaken for the same cause. If interventions in the name of high humanitarian ends, including in defence of fundamental human rights, are sometimes accepted, or at least condoned, to deny the similar justification to revolutions is to undermine the integrity of legal argument. Hence, to maintain the law’s legitimacy and integrity, limited acts of violence in collective furtherance of human rights could be regarded as ‘illegal but justifiable’. In the words of Thomas Franck, ‘[t]his would recognize that in the absence of collective international enforcement of human rights, it may be necessary to license remedial violence by victims themselves’.⁴⁰⁴ He also suggested that the ‘illegal but justifiable’ approach can be paralleled to the domestic concept of mitigation.⁴⁰⁵ On this account, mitigating circumstances do not alter the illegality of a conduct but may affect its consequences, for instance, by imposing less stringent punishment. To support this argument, he referred to two famous cannibalism cases *Regina v Dudley* and *Stephens and US v Holmes*.⁴⁰⁶ In both cases, defendants were found guilty of murder and yet received lenient sentences in recognition of mitigating factors. Commenting on the cases, Franck (and Rodley) observed that

In exceptional circumstances [...] a large power may indeed go selflessly to the rescue of a foreign people facing oppression. But surely no general law is needed to cover such actions [...] in human experience, it has proven wiser to outlaw absolutely conduct which, in practical experience, is almost invariably harmful, rather than to try to provide general exceptions for rare cases. Cannibalism, given its history and man’s propensities, is simply outlawed, while provision is made to mitigate the effect of this law on men adrift in a lifeboat.⁴⁰⁷

It follows, à la Franck, that the international approval of ‘technically illegal but morally justified action’ in Kosovo served as a kind of mitigation of illegal use of force in the same sense as the courts used the concept with respect to absolutely illegal but morally excusable (because resorted to in the view of self-preservation) cannibalism. Thus, moral cause does not render an otherwise illegal action legal (justification) but it may reduce the actor’s culpability

⁴⁰³ The Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000) 191.

⁴⁰⁴ Thomas Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 70.

⁴⁰⁵ Thomas Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (CUP 2002) 184.

⁴⁰⁶ *Regina v Dudley* (1884) LR 14 QBD 273; *Stephens and US v Holmes* (1842) 26 Fed Cas 360, 1 Wall Jr 1.

⁴⁰⁷ Thomas Franck and Nigel Rodley, ‘After Bangladesh: The Law of Humanitarian Intervention by Military Force’ (1973) 67 AJIL 275, 290–91.

(mitigation). The mitigation argument was endorsed by a number of other scholars, referring to the ‘excusable breach approach’,⁴⁰⁸ ‘emergency exit approach’,⁴⁰⁹ and ‘exceptional illegality approach’.⁴¹⁰ Albeit intuitively plausible, the mitigation approach to the ‘illegal but justifiable’ action seems problematic in several respects. First, the conceptual difference between justification, excuse and mitigation is fuzzy in international law. All the three end up drawing heavily on moral justification. Second, the very formula ‘illegal but justifiable’ assumes the rightfulness of the action, whereas excuse and mitigation are premised on the wrongfulness of the conduct. To claim that the action is morally *justified* and yet to subscribe to the mitigation argument is conceptually incongruent. It would be better then to speak of ‘illegal but excused’ or ‘illegal but mitigated’ conduct.⁴¹¹ But such qualifications would not capture the essence of the international reaction to the Kosovo’s intervention, which implied the rightfulness (moral necessity) of such action. Notably, the 2001 Articles on State Responsibility define necessity as a ground precluding wrongfulness, rather than a ground for excusing or softening culpability.⁴¹²

Thus, the ‘illegal but justifiable’ formula is based on the doctrine of justification, meaning that the action in question is ‘almost legal’, that is ‘only a thin red line separates [...] [the] action [...] from international legality’.⁴¹³ In other words, legitimacy may render technically illegal but morally imperative action legal. To claim otherwise is to ‘bring the law into disrepute’.⁴¹⁴ Indeed, the debate on the so-called ‘right to revolution’ oscillates between considerations of legality and legitimacy. It is widely accepted that whilst the positive foundations of this ‘right’ are rather dubious, its moral standing based on the long philosophical pedigree in both Western and Eastern traditions is undeniable. It flows from the notion of human dignity and international principles embodied in the human rights instruments; its existence is presupposed by the very fact of possessing human rights. It is ‘a right to have

⁴⁰⁸ Jane Stromseth, ‘Rethinking Humanitarian Intervention: The Cause for Incremental Change’ in JL Holzgrefe and Robert O Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (CUP 2003) 243.

⁴⁰⁹ Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects* (Gullanders Bogtrykkeri 1999) 27, 99, 112, 116–18, 127–8.

⁴¹⁰ Michael Byers and Simon Chesterman, ‘Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law’ in JL Holzgrefe and Robert O Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (CUP 2003) 198–201.

⁴¹¹ Anthea Roberts, ‘Legality v Legitimacy: Can Uses of Force Be Illegal but Justified?’ in Philip Alston and Euan Macdonald (eds), *Human Rights, Intervention, and the Use of Force* (OUP 2008) 195.

⁴¹² ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, ‘Report of the International Law Commission on the Work of its 53rd Session’ (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, art 25(1).

⁴¹³ Bruno Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 EJIL 1, 1.

⁴¹⁴ Anthea Roberts, ‘Legality v Legitimacy: Can Uses of Force Be Illegal but Justified?’ in Philip Alston and Euan Macdonald (eds), *Human Rights, Intervention, and the Use of Force* (OUP 2008) 195.

rights’, to use the wording of Hannah Arendt, in the sense that people claiming rights must also dispose of means of their vindication. Otherwise such rights are merely rights of the rightness and therefore a void or a ‘mere abstraction’.⁴¹⁵ Because the global enforcement of human rights is still underdeveloped (Kosovo being rather an exception to the global pattern of inaction in the face of abhorrent humanitarian crises) the bottom-up remedial violence against governmental oppression is indispensable⁴¹⁶ if human rights are not to be dismissed as an empty rhetoric. Hence, revolution is not a human right in and of itself but an individual right *sui generis*, whose recognition is justified by the need to secure other (more conventional) rights. Thus, revolution as a right or mechanism of self-defence lacks solid legal ground and is yet morally legitimate. Hence, the concept of ‘illegal but justifiable’ revolution.

6.4. Conclusion

A close examination of the philosophical and normative foundations of revolution shows that it is not a human right in and of itself but constitutes a right *sui generis* under international law. It is, therefore, a second-order right whose derivative nature flows from a set of internationally recognised human rights, such as the right to democracy, the right of self-determination and the right to an effective remedy. It also draws significant normative support from the concept of self-defence and the principle *ubi ius, ubi remedium*. Moreover, the permissibility of revolution is enhanced by the fact that whenever it makes it to the level of an armed conflict, it becomes legitimate belligerency to whom the whole array of IHL is applicable. Such status of a second-tier right does not make the right to revolution ineffective or less significant than other, more

⁴¹⁵ Hannah Arendt, *The Origins of Totalitarianism* (Allen & Unwin 1967). For contemporary readings of the concept of the right to have rights, see Jacques Ranciere, ‘Who is the Subject of the Rights of Man?’ (2004) 103 South Atl Q 297, 298; James D Ingram, ‘What Is a “Right to Have Rights”?’ Three Images of the Politics of Human Rights’ (2008) 102 Am Pol Sci Rev 401; Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (OUP 2012) 118 (‘[C]ontemporary political philosophers have reinterpreted the right to have rights as the right to politics conceived as the rightless taking up, claiming, and enacting the rights they have been denied’). See also Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (Asser Press 2004) 468, 469, 473 (Suggesting that international legal personality be articulated in terms of the right to have rights: ‘[International legal personality] forms the *cords* between the individual human being and the universal human society, and because of it, the international community and international law must guarantee the right to have rights, the right to political participation, i.e., the right to speak out and raise one’s *voice*’. She further asserts that if the state fails or oppresses its people then the people may claim international legal personality back and the international community must ‘*open up* its institutions and law [...] to *include* these human beings’ and thereby affirm their personality) (emphasis original).

⁴¹⁶ This was also acknowledged by Thomas Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 70.

conventional, rights. As international practice shows, individuals can have rights under international law without every such right amounting to a *human* right.⁴¹⁷ It simply implies that the right in question assumes a distinct social and political function, which is the maximisation of the enjoyment of human rights rather than securing a specific objective value. Moreover, the right to revolution involves a more complicated balancing process because by virtue of elevating violence to the level of a permissible action in furtherance of humanitarian cause, the right may excessively interfere with the enjoyment of other (human) rights and even turn out to be destructive thereof. The complexity of such balancing is not only evident in the high stakes in terms of human rights restrictions but also in the fact that it involves a wide stratum of second-tier ethical rules determining legitimacy of violence, which are going to be considered in detail in the following sections. Ultimately, because the *sui generis* character of the right to revolution does not fit neatly within the black-and-white approach to legal doctrine, which is traditionally framed in terms of law and non-law and is hostile to anything that falls in between, conceptualisation of revolution as ‘illegal but justifiable’ in line with the recent international practice aided in clarifying the exceptional nature of the right to revolution as the ultimate means of democracy enforcement.

It is important to note, however, that recognising revolution as a remedy does not suggest legitimating just any form of non-state *jus ad bellum* violence as long as the cause is just. Some forms of violence are impermissible *per se*, such as arbitrary violence, cruelty and indiscriminate terror. Moreover, revolutionary recourse to violence is constrained by rules and principles of international humanitarian law and international human rights law that circumscribe the permissible uses of force by the principles of necessity and proportionality. That said, sketching precise modalities for exercising the right to revolution as well as developing criteria to distinguish it from less deserved types of non-state use of force would not only strengthen the revolution’s still shaky position in international legal discourse but also support the claim that international law recognises the right to democracy and provides for the external and internal mechanisms of its defence and enforcement. These issues are analysed in the succeeding sections.

⁴¹⁷ See eg *Avena and Other Mexican Nationals (Mexico v United States of America)* [2004] ICJ Rep 12, para 124, in which the Court held that the right to consular assistance under article 36 of the Vienna Convention on Consular Relations is an individual right without further elaborating whether this rights amount to a human right. The same tendency is visible in the practise of conclusion of bilateral investment agreements, in which states regularly afford individuals and legal entities substantive and procedural rights under international law and allow them to invoke those rights in arbitration proceedings. However, this does not mean that these treaties lay down new human rights. See also Jan Arno Hessbruegge, *Human Rights and Personal Self-Defence in International Law* (OUP 2017) 79.

6.5. A Second-Tier Framework for ‘Illegal but Justifiable’ Revolution

It is a common assertion within international legal circles that ‘one’s man terrorist is another man’s freedom fighter’. In other words, what one views as terrorism, another can view as freedom-fighting. It means there is no clear distinction between persons fighting against oppression and those committing terrorist acts, since both categories of actors pursue certain political goals and employ violence. Such conceptual confusion is well illustrated by the fact that classic revolutions, such as the French and the American, often involved the resort to terrorism.⁴¹⁸ A more recent example is the current Syrian crisis where President Assad in order to justify his violent crackdown on demonstrators asserted that ‘[n]o political dialogue or political activity can succeed while there are armed terrorist groups operating and spreading chaos and instability’.⁴¹⁹ Similar label of terrorism is applied by Israel to portray Palestinian resistance to obscure confiscation of land and other restrictions on Palestinians. Importantly, this is against the backdrop of the UN’s acknowledgement of such resistance as a legitimate struggle against unlawful occupation of lands by Israel.⁴²⁰ By the same token, the freedom movement of Kashmir views itself as freedom fighters against illegal Indian occupation, whereas India continue to brand them as terrorists.⁴²¹ Thus, the concept of ‘terrorism’ is often used to describe revolutionary violence. Noteworthy, it is not only states who employ this conceptual ambiguity to their advantage, but also the most unsavoury non-state groups can avail themselves of the elasticity of the notion of revolution to style their crimes as resistance. The conceptual permeability between revolution and terrorism was also acknowledged by a host of scholars at the roundtable held under the aegis of the American Society of International Law in 2006 asserting that ‘[r]evolution (like terrorism)

⁴¹⁸ See eg John Tierney, ‘Terror at Home: The American Revolution and Irregular Warfare’ (1977) 12 Stan JIS 1; Vincent R Johnson, ‘The Declaration of the Rights of Man and of Citizens of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris’ (1990) 13 BC ICLR 1.

⁴¹⁹ Kareem Fahim, ‘No Talks with Syria Opposition, Leader Tells UN Envoy’ *NY Times* (10 March 2012) <http://www.nytimes.com/2012/03/11/world/middleeast/no-talks-with-syria-opposition-groups-leader-tells-un-envoy.html?_r=0> accessed 30 September 2016.

⁴²⁰ See John Sigler, ‘Palestine: Legitimate Armed Resistance vs. Terrorism’ *The Electronic Intifada* (17 May 2004) <<https://electronicintifada.net/content/palestine-legitimate-armed-resistance-vs-terrorism/5084>> accessed 21 August 2017; Rima Najjar, ‘Israel’s Illegitimate Tactics Against Palestinian Armed Resistance vs. Legitimate Global Security Concerns’ *Counterpunch* (29 June 2017) <<https://www.counterpunch.org/2017/06/29/israels-illegitimate-tactics-against-palestinian-armed-resistance-vs-legitimate-global-security-concerns/>> accessed 21 August 2017. See also Sami Zeidan, ‘Desperately Seeking Definition: The International Community’s Quest for Identifying the Specter of Terrorism’ (2004) 36 Cornell Int’l LJ 491, 492.

⁴²¹ Mateen Haider, ‘Kashmiris are Freedom Fighters, Not Separatists’ *Dawn* (6 November 2014) <<https://www.dawn.com/news/1142683>> accessed 21 August 2017. See also Salad Ahmad Mir, ‘The Bleeding and Burning Kashmir: Violence, Terrorism and Freedom Struggle’ (2015) 28 Int’l Aff & Glob Strategy 16.

appears to represent a moment of extraordinary force which stands outside or before the law'.⁴²²

Such difficulty to draw a clear line between liberation movements and terrorist criminals has not only impeded the emergence of a legal definition of terrorism for almost a century, but also significantly undermined any efforts to incorporate the notion of revolution into a positive layer of international law. Because, the current state of international law makes no distinction whatsoever between the causes of different non-state actors and, hence, provides no guidance on what armed action is permissible, it leads to a paradoxical state of affairs, where the corpus of international human rights law (IHRL) is ever expanding and making itself felt in almost every aspect of international relations, but its enforcement dimension lags somewhat behind, rendering human rights, particularly the right to democracy, pretty much an empty rhetoric in the authoritarian part of the world. Groups fighting for democracy cause are abandoned to their fate because international law denies them international legal recognition 'of the only action they can take to save themselves in extreme situation where nonviolent resistance leads to only more government atrocities and an international intervention is not forthcoming'.⁴²³ The notion of 'illegal but justifiable' revolution, based on a *principled* setting of secondary regime of obligatory rules, introduces a novel framework within which one could reimagine such distinction. It is difficult to overstate the importance of such an exercise, since revolution as an internal mechanism of democracy defence will never be fully operative as long as there reigns a confusion as to whether a particular act of non-state violence is to be qualified as legitimate resistance or a less deserving case. This consideration is particularly relevant in the post-9/11 political milieu where it is much easier and less costly for states in terms of international acceptance to suppress opposition movements by applying the label 'terrorism'.⁴²⁴ Moreover, such distinction would not only impede authoritarian governments from indiscriminately employing delegitimising terrorist rhetoric but would also encourage actors pursuing certain political cause to employ means that are more acceptable by the international community. Ultimately, a clear distinction between terrorist acts and acts of resistance would secure a better realisation of human rights, since states aware of the legitimate right of their citizens to resist, and violently if necessary, would be more prompted to fulfil their human rights obligations. As Saul has aptly observed, '[i]f international law is not to become complicit in oppression by criminalizing legitimate political

⁴²² ASIL, 'Roundtable — War, Force, and Revolution' (2006) 100 ASIL Proc 261, 261.

⁴²³ Jan Arno Hessbrügge, *Human Rights and Personal Self-Defence in International Law* (OUP 2017) 332.

⁴²⁴ See eg Ludovic Hennebel and Gregory Lewkowicz, 'Le problème de la définition' in Ludovic Hennebel and Damien Vandermeersch (eds), *Juger le terrorisme dans l'État de droit* (Bruylant 2009) 17, 44; Sudha Setty, 'What's in a Name? How Nations Define Terrorism Ten Years After 9/11' (2011) 33 U Pa J Int'l L 1, 57-61; Elizabeth Chadwick, *Self-Determination in the Post-9/11 Era* (Routledge 2013) 3 ('[T]he new anti-terrorist laws and policies adopted since 9/11 have resurrected the old conflation of terrorist acts with liberation tools').

resistance, justifications for terrorist violence must be taken seriously by the law'.⁴²⁵

Beyond the concrete 'terrorists v freedom fighters' dilemma, one should accept the shifting content and meaning of the term revolution and the role of political semantics in such conceptual fluctuation. 'The term "revolution" becomes meta-historical, transcendental and applicable to all times and places, used to refer to a kind of "great leap" forward along the progressive line of human development'.⁴²⁶ In these senses, it represents a tool of salvation and emancipation at the hands of actors viewing themselves as subjugated and willing to change what they view as unjust. In order to meet demands for justice of the increasing number of people inspired by the globalisation and humanisation of the current international legal order, demands that imply only a limited restructuring of the incumbent government politics instead of the radical change of the political order akin to historical revolutionary movements, the concept of revolution seems to lose certain of its distinctive features, making itself even more vulnerable to serve selective political objectives. Even when a significant change is rhetorically sought, the practice of the twenty-first-century anti-constitutional changes of government dubbed as revolutions shows that the post-revolutionary environment is nevertheless often marked by structural continuities, which implies that the label 'revolution' is increasingly employed strategically. In face of this, a subtle conceptual framework is vital in order to add shade and texture to otherwise highly amorphous concept.

In what follows, the notion of 'illegal but justified' revolution is delineated through a prism of the second-order rules originating in the just war theory (JWT), such as legitimate cause, legitimate means, legitimate target and a set of legitimate conditions, including subsidiarity, legitimate authority and reasonable prospect of success. The notion of terrorism as the most acute constraining factor within any debate on the permissibility of non-state violence is taken as a contrasting example to facilitate the understanding of strengths and possible limits of the application of the just war criteria to the concept of revolution. Thus, before constructing a second-tier framework of differentiation between revolution and terrorism as a means of the delineation of conceptual boundaries of the notion of 'illegal but justifiable' revolution, the thesis will first look at the conceptual evolution of the notion of terrorism and sketch out its legal underpinnings. It is demonstrated that even though the notion of terrorism is not sufficient in itself to illuminate the limits of permissible action against the state, it provides an essential conceptual and legal basis for framing the distinction between legitimate and illegitimate forms of non-state violence. In this sense, clarifying the dilemma of 'terrorists v freedom fighters' is asserted to be an inevitable step towards the delineation of the second-order framework for revolution as the most widespread form of modern freedom-fighting. However, because the notion of freedom-fighting

⁴²⁵ Ben Saul, *Defining Terrorism in International Law* (OUP 2006) 69.

⁴²⁶ Owen Taylor, 'Reclaiming Revolution' (2011) 22 *FYBIL* 259, 264.

historically refers to a limited set of cases of anti-government resistance, namely struggles against colonial, alien and racial domination, other situations involving subjugated and oppressed people seemingly fall foul of freedom-fighting. Against this backdrop, it is asserted that not only is revolution conceptually close to the notion of freedom-fighting, but also the revolutionary cause of defending democracy and human rights has come to enlarge the concept of freedom-fighting due to the evolving nature of the principle of self-determination, which underpins both revolutionary and national liberation battles. This thesis eventually investigates the concept of the JWT, its legal status and applicability to non-state use of force to assert that the second-tier regime of the JWT is the most relevant normative setting for 'illegal but justifiable' revolution. It is concluded that whenever non-state violence abides by the aforementioned strata of secondary norms, it is by definition legitimate.

6.5.1. Terrorism as an Illegitimate Form of Political Violence

Because the phenomenon of terrorism represents the major constraining factor within any debate on permissibility of non-state use of force and the principle political obstacle militating against the legalisation of revolution as an ultimate means of defence against an oppressive regime, it is imperative to trace its conceptual evolution and legal underpinnings. Moreover, the examination of constitutive elements of the crime of terrorism, such as, e.g., purpose, means and target, as well as the extent to which they are codified in international law will aid in delineating crucial divergences vis-à-vis revolutions.

The term 'terrorism' is one of the most slippery and abused terms in international relations. It is ideologically and politically loaded,⁴²⁷ pejorative,⁴²⁸ emotive,⁴²⁹ capable to stigmatise and delegitimise,⁴³⁰ denigrate and dehumanise those at whom it is directed⁴³¹ and the one which invokes moral, social and value judgment.⁴³² To make matters worse, the term is highly imprecise, ambiguous and is said to 'serve [...] no operative legal purpose'.⁴³³

⁴²⁷ Joseph J Lambert, *Terrorism and Hostages in International Law: A Commentary on the Hostages Convention* (CUP 1990) 13; See also Thomas Franck and Bert B Lockwood, 'Preliminary Thoughts Towards an International Convention on Terrorism' (1974) 68 AJIL 69, 89.

⁴²⁸ Jean-Marc Sorel, 'Some Questions About the Definition of Terrorism and the Fight Against Its Financing' (2003) 14 AJIL 365, 366; Tomis Kapitan, 'The Terrorism of "Terrorism"' in James P Sterna (ed), *Terrorism and International Justice* (OUP 2003) 49.

⁴²⁹ Conor Cruise O'Brien, 'Liberty and Terror. Illusions of Violence, Delusions of Liberation' (1977) 49 Encounters 34, 34.

⁴³⁰ Jean-Marc Sorel, 'Some Questions About the Definition of Terrorism and the Fight Against Its Financing' (2003) 14 AJIL 365, 366.

⁴³¹ Ben Saul, *Defining Terrorism in International Law* (OUP 2006) 3.

⁴³² UNCHR, 'Terrorism and Human Rights: Progress Report by Special Rapporteur K Koufa' (27 June 2001) UN Doc E/CN.4/Sub.2/2001/31, 8, 11.

⁴³³ Richard R Baxter, 'A Sceptical Look at the Concept of Terrorism' (1974) 7 Akron L Rev 380, 380.

In as early as 2011, 250-plus various official and academic definitions of terrorism were identified.⁴³⁴ In the words of one scholar, ‘the search for a single definition has come to resemble the quest for the Holy Grail’.⁴³⁵ In view of the absence of a universally-agreed definition of terrorism, the ‘struggle over the representation of a violent act is a struggle over its legitimacy’,⁴³⁶ namely who is entitled to use violence, against whom and for what purposes. Because the disagreement over the definition of terrorism is rather political than technical, it is possible to generally sketch the contours of the definition. One of the most authoritative definitions is the 1988 *academic consensus definition* of terrorism. Noteworthy, this definition had been arrived at as an outcome of two rounds of questionnaire responses, whose results were published in the 1984 and 1988 editions respectively of Schmidt *et al*’s research guide *Political Terrorism*.

Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual, group or state actors, for idiosyncratic, criminal, or political reasons, whereby — in contrast to assassination — the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat- and violence-based communication process between terrorist (organisation), (imperilled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a *target of terror*, a *target of demands*, or a *target of attention*, depending on whether intimidation, coercion, or propaganda is primarily sought.⁴³⁷

This definition has received considerable acceptance both inside and outside academia⁴³⁸ and was eventually refined in 2011.⁴³⁹ Its main elements are: (1) dual character of the term ‘terrorism’; (2) threefold context; (3) perpetrator as a source or agent of violence; (4) political; (5) violent act; (6) threat-based communication; (7) differentiation between direct civilian victims and the ultimate target audience; (8) terror/fear/dread; (9) intent; (10) campaign.⁴⁴⁰ It is clear from the aforementioned that the academic definition of terrorism is quite specific on the paradigmatic characteristics of the terrorist violence which may serve as a useful yardstick in an attempt to draw up the distinction

⁴³⁴ Alex P Schmidt, ‘The Definition of Terrorism’ in Alex P Schmidt (ed), *The Routledge Handbook of Terrorism Research* (Routledge 2011) 99-148.

⁴³⁵ Omar Malik, *Enough of the Definition of Terrorism* (Royal Institute of International Affairs 2000) xvii.

⁴³⁶ Ben Saul, *Defining Terrorism in International Law* (OUP 2006) 3. See also Michael V Bhatia, ‘Fighting Words: Naming Terrorists, Bandits, Rebels and Other Violent Actors’ (2006) 26 TWQ 5, 13.

⁴³⁷ Alex P Schmidt and others, *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature* (2nd edn, Centre for International Affairs 1988) 28.

⁴³⁸ See Alex P Schmidt, ‘The Definition of Terrorism’ in Alex P Schmidt (ed), *The Routledge Handbook of Terrorism Research* (Routledge 2011) 61.

⁴³⁹ *ibid* 86-87 (This came to be known as a ‘revised academic consensus definition of terrorism’).

⁴⁴⁰ *ibid* 76-83.

between this and revolutionary violence. Yet, it lacks legal authority in international law. As far as international law is concerned, a generally accepted comprehensive definition is still lacking, with only certain elements identified above having been agreed to constitute the crime of terrorism. Such 'limited' definition cannot provide a clear dividing line between terrorists and freedom fighters because it was intentionally designed to avoid such a sensitive issue. This merits a more detailed examination.

The process of criminalisation of terrorism went through three phases: (1) codification of political crimes (1800s-1890s); (2) anti-anarchist legislation (1890s-1920s); and (3) international conventions on terrorism (1930s-present).⁴⁴¹ The final stage of the last epoch is the Global War on Terror

⁴⁴¹ The most important conventions (also called 'sectoral' treaties) are Convention for the Prevention and Punishment of Terrorism (adopted 16 November 1937, not in force) LN Doc C.546.M.383.1937.V (1938) 19 League of Nations OJ 23; Convention on Offenses and Certain Other Acts Committed on Board Aircraft (adopted 14 September 1963, entered into force 4 December 1969) 704 UNTS 220; Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105 (Hijacking Convention); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (adopted 23 September 1971, entered into force 26 January 1973) 974 UNTS 178; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 167; International Convention Against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205 (Hostage-Taking Convention); Convention on the Physical Protection of Nuclear Material (adopted 3 March 1980, entered into force 8 February 1987) 1456 UNTS 125; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted 24 February 1988, entered into force 6 August 1989) 1589 UNTS 474; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 221 (Safety of Maritime Navigation Convention); Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 374; Convention on the Marking of Plastic Explosives for the Purpose of Detection (adopted 1 March 1991, entered into force 21 June 1998) 2122 UNTS 359; Convention on the Safety of United Nations and Associated Personnel (adopted 9 December 1994, entered into force 15 January 1999) 35457 UNTS 2051 (UN Personnel Convention); International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256 (Terrorist Bombings Convention) (converted the crimes from the previous conventions into terrorist offences by listing them in its Annex); International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197 (Terrorist Financing Convention); International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, entered into force 7 July 2007) 2445 UNTS 89; Draft Comprehensive Convention against International Terrorism, UN Doc A/59/894 (12 August 2005); Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (adopted 14 October 2005, not yet in force) <<https://www.unodc.org/tldb/pdf/Protocol%20Fixed%20Platforms%20EN.pdf>> accessed 14 October 2016; Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (adopted 14 October 2005, not yet in force) <https://www.unodc.org/tldb/en/2005_Protocol2Convention_Maritime%20Navigation.html> accessed 14 October 2016.

triggered by the 9/11 attacks on Twin Towers in New York.⁴⁴² It is the third phase that constitutes the focus of this research. The distinctive feature of the majority of the anti-terrorism treaties is their delineation of specific activities as terrorist without creating a generic crime of terrorism — a so-called ‘enumerated acts approach’.⁴⁴³ Any attempt to adopt the comprehensive definition failed because, *inter alia*, some states supported the use of terrorism to advance political goals.⁴⁴⁴ Moreover, the UN’s commitment to self-determination clouded its vision with respect to terrorism.⁴⁴⁵ Yet, a few of the treaties do mirror a more comprehensive approach to the definition of terrorism by prohibiting acts aimed to compel a third party ‘to do or abstain from doing any act’.⁴⁴⁶ Yet, the generic and imprecise wording of these conventions is an inevitable compromise with recently liberated states holding the position of solidarity in relation to national liberation movements.⁴⁴⁷ The 1999 Terrorist Financing Convention comes closest to delineating an essential definition of terrorism. It prohibits the financing of:

⁴⁴² See Aleksandr Marsavelski, ‘The Crime of Terrorism and the Right of Revolution in International Law’ (2013) 28 Conn J Int’l L 241, 248.

⁴⁴³ The term is borrowed from Andrea Bianchi and Yasmin Naqvi, *International Humanitarian Law and Terrorism* (Hart Publishing 2011) 270. Importantly, the 1937 Terrorism Convention contains a partly generic and partly enumerated definition of terrorism. Convention for the Prevention and Punishment of Terrorism (adopted 16 November 1937, not in force) LN Doc C.546.M.383.1937.V (1938) 19 League of Nations OJ 23.

⁴⁴⁴ Reuven Yong, ‘Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definition in Domestic Legislation’ (2006) 29 BC Int’l & Comp L Rev 23, 37-39.

⁴⁴⁵ Jose E Alvarez, ‘The U.N.’s “War” on Terrorism’ (2003) 31 Int’l J Legal Info 238, 238. See also UNGA ‘Speakers Call for Comprehensive International Convention on Terrorism, In General Assembly Debate’ UN Doc GA/9922 (2 October 2001) (Hasmy Agam (Malaysia) said that ‘[a]cts of pure terrorism, involving attacks against innocent civilian populations, should be differentiated from legitimate struggles of peoples under colonial, alien or foreign domination for self-determination and national liberation, as recognized by resolutions of the United Nations and other international declarations’); UNGA ‘Calls for Resolute Action Against Terrorism Tempered in Assembly by Appeals for Caution in Identifying “Enemy”’ UN Doc GA/9962 (12 November 2001) (‘It was unacceptable to label as terrorism the struggle of peoples to protect themselves or to attain their independence’).

⁴⁴⁶ International Convention Against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205 (Hostage-Taking Convention) art 1(1); Convention on the Safety of United Nations and Associated Personnel (adopted 9 December 1994, entered into force 15 January 1999) 35457 UNTS 2051 (UN Personnel Convention) art 9(1)(c); Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 221 (Safety of Maritime Navigation Convention), art 3(1)(b), (c) and (e); Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 374, art 2(2)(c); International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, entered into force 7 July 2007) 2445 UNTS 89, art 9(d).

⁴⁴⁷ Reuven Yong, ‘Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definition in Domestic Legislation’ (2006) 29 BC Int’l & Comp L Rev 23, 38.

Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.⁴⁴⁸

Considering the fact that it has attracted 188 ratifications as of December 2018, its definition of terrorism remains one of the most influential and framed a basis for the negotiations of the draft Comprehensive Convention against International Terrorism (CCIT) definition. Whilst most articles of the draft Comprehensive Convention have been completed, finalisation is held up by, among others, the question of definition. As of autumn 2018, the following informal text of article 2 exists with regard to definition:

Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:

- (a) Death or serious bodily injury to any person; or
- (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or
- (c) Damage to property, places, facilities or systems referred to in paragraph 1(b) of the present article resulting or likely to result in major economic loss; when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.⁴⁴⁹

Hence, the common feature of the terrorism conventions laying down the essential elements of terrorism is the requirement that the prohibited act be committed to intimidate or compel certain persons and actors to do or refrain from doing any act. Thus, coercion is an underlying motive: '[O]rdinary offences [...] become terrorist because of the motivations of the offender'.⁴⁵⁰ What lies behind coercion, that is an emotion prompting an act, such as a specific ideological or political belief, is immaterial. Yet, when it comes to the 'terrorists v freedoms fighters' puzzle, this definition is meaningless as it lumps together terrorist activities and struggles for freedom, since both types of violence imply coercion. This is unacceptable for states, predominantly of the Arab world, making use of terroristic tactics for their own political ends: on the one hand, general criminalisation of terrorism is an important tool of

⁴⁴⁸ International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197 (Terrorist Financing Convention) art 2(1)(b).

⁴⁴⁹ Draft Comprehensive Convention against International Terrorism, UN Doc A/59/894 (12 August 2005) art 2. This definition has been widely criticised for being too broad and too narrow at the same time. The main points of contention are succinctly summarised by Alex P Schmidt, 'The Definition of Terrorism' in Alex P Schmidt (ed), *The Routledge Handbook of Terrorism Research* (Routledge 2011) 52-58.

⁴⁵⁰ European Commission, Proposal for a Council Framework Decision on combating terrorism (19 September 2001) COM (2001) 521 Final, 2001/0217 (CNS) 7.

maintaining internal sovereignty, on the other hand, watering down this definition so that it would not encompass terrorist groups they sponsor is an equally crucial objective.⁴⁵¹

This double-edge-sword approach is clearly visible in some regional treaties containing contradictory exclusion clauses. For instance, article 2(a) of the 1998 Arab Convention on the Suppression of Terrorism states: 'All cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with the principles of international law, shall not be regarded as an offence'.⁴⁵² Similar provision features in the 1999 OIC Convention on Combating International Terrorism: 'Peoples struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime'.⁴⁵³ Paradoxically, in both conventions these exclusions co-exist with a more general requirement that the 'motives or intentions/purposes' behind the prohibited acts are irrelevant to their terrorist character.⁴⁵⁴ Finally, the 1999 OAU Convention

⁴⁵¹ Boaz Ganor, 'Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?' (2002) 3 PPR 287, 288. For an overview of states' concerns in relation to the comprehensive definition of terrorism, see UNGA Sixth Committee (67th session) 'Legal Committee Urges Conclusion of Draft Comprehensive Convention on International Terrorism' (8 October 2012) UN Doc GA/L/3433 (Ibrahim Salem (Egypt), speaking for the OIC, said that 'when applying counter-terrorist measures, a distinction must be made between the definition of terrorism and the right of peoples to self-determination'. Similarly, Abdulahman Al-Ahmed (Saudi Arabia) said 'it was necessary to distinguish between terrorism and the killing of innocent people on the one hand, and aggression and the right to fight against occupation on the other hand'. Likewise, Abdalla Aljasmi (United Arab Emirates) said, '[a]ll States should also exhibit flexibility in reaching an international agreement on the comprehensive convention. In this regard, an international conference should be held to define terrorism and to distinguish it from the right of people to self-determination').

⁴⁵² Arab Convention on the Suppression of Terrorism (adopted 22 April 1998, entered into force 7 May 1999) art 2(a) <https://www.unodc.org/tldb/pdf/conv_arab_terrorism.en.pdf> accessed 14 October 2016.

⁴⁵³ Convention of the Organization of the Islamic Conference on Combating International Terrorism (adopted 1 July 1999, entered into force 7 November 2002) art 2(a) <http://www.oic-oci.org/english/convention/terrorism_convention.htm> accessed 14 October 2016.

⁴⁵⁴ Arab Convention on the Suppression of Terrorism (adopted 22 April 1998, entered into force 7 May 1999) art 1(2) <https://www.unodc.org/tldb/pdf/conv_arab_terrorism.en.pdf> accessed 14 October 2016 (Defining terrorism as 'any act or threat of violence, *whatever its motives or purposes*, that occurs for the advancement of an individual or collective criminal agenda, causing terror among people, causing fear by harming them, or placing their lives, liberty or security in danger, or aiming to cause damage to the environment or to public or private installations or property or to occupy or to seize them, or aiming to jeopardize a national resource') (emphasis added); Convention of the Organization of the Islamic Conference on Combating International Terrorism (adopted 1 July 1999, entered into force 7 November 2002) art 1(2) <http://www.oic-oci.org/english/convention/terrorism_convention.htm> accessed 14 October 2016 ('"Terrorism" means any act of violence or threat thereof *notwithstanding its motives or intentions* perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperilling their lives, honor, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the

elucidates that ‘the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts’.⁴⁵⁵ Similarly to the Arab League and OIC Conventions, it includes a disclaimer stating that ‘[p]olitical, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act’.⁴⁵⁶ This is reiterated in the 2004 Protocol to the Convention.⁴⁵⁷ Importantly, such exclusion clauses are omitted in the regional instruments of the Americas and Europe.⁴⁵⁸ Thus, whilst regional treaties on terrorism provide for more elaborated definitions of terrorism than their international counterparts, by combining both generic and enumerated approaches, these definitions vary significantly and well reflect fundamental disagreements about the permissibility and classification of political violence.

Because the means of effecting terrorism are ever-evolving, the sectoral approach to the definition of terrorism has been recognised as severely limited and the interest remains to agree on a generic definition of terrorism. The adoption of the CCIT is one such possibility, the other being the inclusion of the crime of terrorism within the Rome Statute of the ICC.⁴⁵⁹ Apart from treaty law, it is increasingly suggested that prohibition of terrorism, or at least of certain terrorist acts, has become a norm of customary international law.⁴⁶⁰ This

stability, territorial integrity, political unity or sovereignty of independent States’) (emphasis added).

⁴⁵⁵ OAU Convention on the Prevention and Combating of Terrorism (adopted 1 July 1999, entered into force 6 December 2002) art 3(1) <http://www.au.int/en/sites/default/files/treaties/7779-file-oau_convention_prevention_combating_terrorism.pdf> accessed 14 October 2016.

⁴⁵⁶ *ibid* art 3(2).

⁴⁵⁷ Protocol to the OAU Convention on the Prevention and Combating of Terrorism (Addis Ababa, 8 July 2004) preamble, art 1(12) <<http://www.peaceau.org/uploads/protocol-oau-convention-on-the-prevention-combating-terrorism-en.pdf>> accessed 14 October 2016.

⁴⁵⁸ For a detailed discussion, see Ben Saul, *Defining Terrorism in International Law* (OUP 2006) 145–67. For a full list of regional instruments on terrorism, see UN, *International Instruments related to the Prevention and Suppression of International Terrorism* (United Nations 2008) 159–346.

⁴⁵⁹ The ILC proposed in its 1994 Draft Statute for the ICC the inclusion of treaty crimes such as terrorism within the Court’s material jurisdiction. However, such inclusion was rejected by the Preparatory Committee of the Rome Statute. See the ILC Draft Statute for an International Criminal Court (1994) II ILCYB part 2, art 20 (Apart from genocide, aggression, war crimes and crimes against humanity, the ILC suggested that the Court shall have jurisdiction with respect to ‘crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern’). However, the Final Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC holds that the crime of terrorism could at a later stage be included within the jurisdiction of the Court. See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (17 July 1998) UN Doc A/CONF.183/10.

⁴⁶⁰ See Patrick Robinson, ‘The Missing Crimes’ in Antonio Cassese, Paolo Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol I (OUP 2002) 518; Antonio Cassese, ‘Terrorism as an International Crime’ in Andrea Bianchi (ed),

is evidenced by adoption of various international and regional anti-terrorism conventions, UNGA resolutions and criminalisation of terrorism in numerous national laws containing largely similar definitions of the offence. As the Special Tribunal for Lebanon (STL) has observed, there is ‘a settled practice concerning the punishment of acts of terrorism’ and ‘this practice is evidence of a belief of States that the punishment of terrorism responds to a social necessity (*opinio necessitatis*) and is hence rendered obligatory by the existence of a rule requiring it (*opinio juris*)’.⁴⁶¹ However, objections to such a hasty conclusion are also aplenty.⁴⁶² Ultimately, some terrorist acts may fall under the definition of other international crimes, such as war crimes, crimes against humanity, genocide or torture, if they contain the elements of these crimes.⁴⁶³ Yet, the question whether the prohibition of terrorism is a treaty norm or a customary rule is not pertinent considering the fact that the comprehensive definition of terrorism is still lacking. The main bone of contention in disputes on the comprehensive definition is whether freedom fighters engaged in national liberation struggles can be classified as terrorists. As long as agreement on this issue is missing, no consent on the (legal) notion of terrorism is ever to evolve. If this state of affairs is not remedied, the status of revolution as a legitimate form of political violence will continue to remain in the state of legal limbo, not to mention the negative impact of such ambiguity on the counter-terrorism measures. Thus, even though the concept of terrorism alone is only of limited significance for elucidating the legal dimension of revolution, it may be taken as a useful starting point to build the distinction between virtuous and non-virtuous types of political violence. In this sense, resolving the enigma of ‘terrorists v freedom fighters’ is an essential step towards the ascertainment of revolution’s extraordinary standing in international law.

Yet, before drawing a principled framework of ‘illegal but justifiable’ revolution based on the differentiation between deserved and undeserved types of non-state violence, one has to investigate the link between revolution and

Enforcing International Law Norms Against Terrorism (Hart Publishing 2004) 213-25; Antonio Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’ (2006) 4 JICJ 933, 935; Marcello Di Filippo, ‘Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes’ (2008) 19 EJIL 533, 569; *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (Decision) STL-11-01/I/AC/R176bis (16 February 2011) paras 85, 102. For an analysis of the above decision, see Kai Ambos, ‘Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?’ (2011) 24 LJIL 655.

⁴⁶¹ *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (Decision) STL-11-01/I/AC/R176bis (16 February 2011) paras 85, 102.

⁴⁶² See eg Ben Saul, *Defining Terrorism in International Law* (OUP 2006) 319; Andrea Bianchi and Yasmin Naqvi, *International Humanitarian Law and Terrorism* (Hart Publishing 2011) 285.

⁴⁶³ See eg Andrea Bianchi and Yasmin Naqvi, *International Humanitarian Law and Terrorism* (Hart Publishing 2011) ch 5.

freedom-fighting — a link which all too often seems to be taken as a given within scholarly circles.

6.5.2. Revolution as a Modern Form of Freedom-Fighting

While a lot of effort has been put into an attempt to delineate the concept of terrorism, freedom-fighting has escaped such profiling. The term ‘freedom-fighting’ has been commonly used interchangeably with ‘national liberation movements’, ‘wars of national liberation’, ‘resistance against foreign occupation’, ‘guerrilla warfare’ and ‘self-determination movements’. In this sense, freedom-fighting is a political struggle by a people against the established government to achieve self-determination. Whilst struggles of this type have been led since the foundation of the sovereign state system, the lion share of such conflicts occurred in post-colonial Africa in the second half of the twentieth century.⁴⁶⁴ Their distinctive feature is the use of non-state armed force to challenge the established government. National liberation movements view such resort to force as a ‘just war’, as legitimate exercise of a right to revolution in the name of self-determination.⁴⁶⁵ Thus, freedom-fighting is a *revolutionary* struggle aimed to advance self-determination. Its other central features are mass popular support and defensive character. Freedom movements are not the activities of small groups of isolated individuals but *peoples’* movements ‘seeking freedom, independence, and/or autonomy from what are perceived as oppressive and usually “alien” regimes’.⁴⁶⁶ They are, in the words of Taber, struggles of ‘rebellious nations against foreign invaders or the ruling classes of their society, of exploited against exploiters, of the governed against the governors’.⁴⁶⁷ They are invariably *defensive* responses to oppression and ethnocide (suppression of culture through forced assimilation), which can also be driven by aspirations for a different and more just order. Thus, such set of common characteristics as violent action, mass support, defensive nature and anti-government orientation approximate the concept of freedom-fighting with the notion of revolution. In fact, both concepts can be generically designated as resistance against oppression. Such conceptual mergence is, for example, clearly visible in the definition of a ‘freedom fighter’ given by the Oxford dictionary, which designates him as ‘[a] person who takes part in a *revolutionary* struggle to achieve a political goal, especially in order

⁴⁶⁴ Noelle Higgins, ‘International Law and Wars of National Liberation’ (*Oxford Bibliographies*, 29 May 2014) <<http://www.oxfordbibliographies.com/view/document/obo-9780199743292/obo-9780199743292-0072.xml>> accessed 21 August 2017.

⁴⁶⁵ *ibid.*

⁴⁶⁶ Jeff Sluka, ‘National Liberation Movements in Global Context’ (*Tamilnation.org*, 15 May 2007) <<http://tamilnation.co/conferences/cnfNZ96/jeffsluka.html>> accessed 21 August 2017.

⁴⁶⁷ Robert Taber, *War of the Flea: The Classic Study of Guerrilla Warfare* (Brassey’s Inc 2002) 174.

to overthrow their government'.⁴⁶⁸ Indeed, it is clear from the definition that the concepts of 'freedom-fighting' and 'revolution' are treated synonymously.

Yet, the notion of freedom-fighting also embraces certain characteristics which revolution may or may not have. Whereas both types of resistance revolve around the ideas of freedom and self-determination, the latter two are accommodated differently within their underlying causes. In fact, freedom movements are more often than not nationalist movements seeking first greater autonomy and evolving over time into full-scale independence movements.⁴⁶⁹ This means that they do not only stand against a government they regard oppressive but also against the whole, so to say, 'alien' state, including the large portion of its population with whom they do not share a sentiment of patriotism and national belonging. Indeed, in the terminology of international law, freedom-fighting, or more commonly 'national liberation movement', refers to an organisation struggling by force of arms against colonial, alien or racist domination.⁴⁷⁰ Revolutions, in their turn, typically lack this nationalistic and ethnic-based perspective and target specifically oppressive regimes without invoking territorial claims. In addition, freedom as self-determination is perceived differently by freedom fighters and revolutionaries. Whereas for the former, freedom is fully achieved in national independence (*freedom from* foreign rule), for the latter, freedom is attained in the establishment of democratic rights and civil liberties for the individual (*freedom to* personal development, equality and empowerment). Finally, legal standing of national liberation movements is more or less settled in international law, whereas legal status of revolution is still in search of a doctrine. The above discussion seems to suggest that freedom-fighting and revolution are distinct modes of resistance and cannot be conflated.

Yet, this thesis suggests that revolution is a modern variation of freedom-fighting precipitated by changes in dynamics of contemporary conflicts and the evolving concept of self-determination. This is not to say that traditional causes of freedom fighting, such as fight against colonial domination, alien

⁴⁶⁸ English Oxford Living Dictionaries
<https://en.oxforddictionaries.com/definition/freedom_fighter> accessed 17 August 2017 (emphasis added).

⁴⁶⁹ Jeff Sluka, 'National Liberation Movements in Global Context' (*Tamilnation.org*, 15 May 2007) <<http://tamilnation.co/conferences/cnfNZ96/jeffsluka.html>> accessed 21 August 2017.

⁴⁷⁰ See Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 December 1960); Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970); Basic Principles on the Legal Status of the Combatants Struggling against Colonial and Alien Domination and Racist Regimes, UNGA Res 3103 (XXVIII) (12 December 1973); Declaration on the Definition of Aggression, UNGA Res 3314 (XXIX) (14 December 1974). The core legal instrument that accommodates wars of national liberation is Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 17512 (Geneva Protocol I) art 1. See also David W Glazier, 'Wars of National Liberation,' MPEPIL A1 (Spring edn, 2009) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e442?prd=EPIL>> accessed 19 September 2017.

occupation and racist regimes, are not invoked in the post-colonial context (the most prominent example being the Palestine Liberation Organisation, which is internationally recognised as a legitimate struggle for national liberation against foreign occupation and was granted the permanent observer status in the UN) but that they are less frequent and are bound to disappear in the near future.⁴⁷¹ Instead, revolutionary causes, such as defence of individual liberty through the establishment of democracy and protection of human rights, are more prominent and continue to expand the conceptual limits of the notion of freedom-fighting.⁴⁷² This development is an inevitable consequence of the progressively widening scope of the concept of self-determination underpinning both traditional liberation struggles and revolutions. Because the decolonisation process did not bring the desired self-determination of peoples, with many ethnic groups being locked in multi-ethnic states, who are, in turn, unwilling to account for the interests of their ethnic communities, the principle of self-determination has acquired a new, *internal*, dimension which includes the right of people to free determination of their political status and free pursuance of their economic, social and cultural development⁴⁷³ but within the borders of an existing state. People's struggles for the above-enlisted causes underpin modern revolutions.

However, one may legitimately object to the view that revolutionary struggles are self-determination struggles properly so called. The concept of self-determination is traditionally grounded on the ethnic-based understanding of 'people' as a unit of self-determination, whereas people engaged in revolutionary struggles are, as indicated above, bound together by certain non-ethnonatural characteristics, such as common cause (to defend democracy and human rights). Indeed, article 1 of the UN human rights covenants provides that 'all *peoples* have the right of self-determination'. This implies that not every population has this right; solely peoples do. According to the *historical* account of this issue, 'peoples' are only the indigenous populations of the territories of Asia, Africa and elsewhere that were colonised by Western European powers in the period from the fifteenth to the nineteenth centuries.⁴⁷⁴ Under the law of decolonisation, such peoples possess an inherent right to free themselves from the yoke of colonialism and establish independent states,

⁴⁷¹ Konstantinos Mastorodimos, 'National Liberation Movements: Still a Valid Concept (with Special Reference to International Humanitarian Law)?' (2015) 17 *Oregon Rev Int'l L* 71, 109 ('Unless there is a shift in attitudes, both from states and non-state actors, it might be time to declare liberation movements as a legal term dead').

⁴⁷² This idea also underpinned the notion of revolution as a legitimate belligerency developed in section 6.3.4 of this thesis.

⁴⁷³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 1; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 1. See also section 3.3.

⁴⁷⁴ See eg *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 52 (Holding that the right of self-determination is only applicable to territories under a colonial regime).

including by the means of armed force. Such situations are now commonly treated as wars of national liberation and collectivities waging such wars as national liberation movements, or freedom fighters. Departing from this restrictive view was in the opinion of many equivalent to bringing chaos to international relations. However, with the collapse of communism, it was accepted that not only unjustly conquered populations had the right to free themselves from colonial domination but also a broader spectre of 'people' not confined to historical colonies could exercise such right, including the states of the Soviet bloc which broke the chains of communist domination and claimed independence. However, the rapid transformation of the doctrine of self-determination did not stop there. Gradually, the notion of 'people' has broadened even further to incorporate subjugated ethnic groups appealing to ethnicity bonding as a justification for their separation from the parent state. This came to be known as the *nationalist* view of self-determination.⁴⁷⁵ Akin to the historical account, the nationalist view is likewise ethnic-centred: the populations and nations are peoples defined by some sort of ethnic minority status with respect to the dominant population.

Despite the considerable support of the nationalist conception in diplomatic practice and scholarly community, it is increasingly acknowledged that the nationalist and more generally ethnicity-based view on self-determination is inadequate because it fails to provide for consistent and exhaustive criteria designating 'a people' and is in tension with the democratic exigencies of the principle itself. Moreover, the principle of self-determination viewed through the ethnicity spectacles is dangerous because instead of the promised emancipation it easily leads to exclusion, discrimination, ethnic conflict and even genocide.⁴⁷⁶ Premised on certain romantic notion of popular sovereignty, the appeal to national self-determination is bound to be raised whenever one views one's ethnic divergence (race, religion, language or culture) as a ground for affirming the existence of foreign domination — whether real or imaginary. As one scholar observed, '[i]f the exercise of this right [to self-determination] is only limited to ethnic groups — who have to be different from the rest of the population of the state — then a very dangerous thing can occur: they will try to prove that they are indeed *different*. In order to do that they will construct a national hallucination'.⁴⁷⁷ These challenges have well been exposed in the host of recent ethnicity-based tensions and conflicts, including Quebec, Catalonia, the Basque regions, the South Ossetia, Kosovo, Scotland and Ukraine, where ethnicity, religion and language were advanced as sufficient justifications for groups to secede from the parent states.

Considering these and other difficulties, recent interpretations of self-determination have distanced themselves from nationalism. Such

⁴⁷⁵ Fernando R Teson, 'Introduction: The Conundrum of Self-Determination' in Fernando R Teson (ed), *The Theory of Self-Determination* (CUP 2016) 3.

⁴⁷⁶ *ibid* 4-5.

⁴⁷⁷ Elizabeth Rodriquez-Santiago, 'The Evolution of Self-Determination of Peoples in International Law' in Fernando R Teson (ed), *The Theory of Self-Determination* (CUP 2016) 238.

interpretations are increasingly based on non-ethnic criteria of peoples invoking self-determination, such as a shared sentiment of justice and collectively experienced wrong inflicted by the parent state (e.g., the doctrine of remedial secession),⁴⁷⁸ and focus on non-territorial means of achieving self-determination (e.g., the doctrine of internal self-determination).⁴⁷⁹ In this configuration, self-determination is recognised whenever a state is unjustly oppressing its citizens and massively and sustainably violating their human rights irrespective of their race, religion or language. Hence, peoplehood ceases to be the basis for self-determination, injustice is. This implies that the ‘self’ of the principle of self-determination does not exist in any absolute sense to whom the right to self-determination would unproblematically appertain, but such ‘self’ only belongs to people who decide to constitute themselves as such by virtue of sharing a common aspiration to self-determine,⁴⁸⁰ triggered by the injustices they encountered. People are, thus, no longer defined in ethnic (objective) terms but in political (subjective) terms, that is instead of searching for a set of pre-defined and incontrovertible objective features, such as language, religion and ethnicity, one has to look at the subjective element of the notion of people, which is a shared belief among members of the collectivity that they constitute a distinctive political unit. Such non-ethnic approach to self-determination is also, to a certain degree, supported by Walzer who views the use of force as one of the prerequisites of a people entitled to self-determination. He opines that ‘[t]he mere appeal to the principle of self-determination isn’t enough; evidence must be provided that a community actually exists whose members are committed to independence and ready and able to determine the conditions of their own existence. Hence the need for political or military struggle sustained over time’.⁴⁸¹ He further states that ‘communities which do not fight are not entitled to self-determination, for, actually, they are not genuine communities at all’.⁴⁸² In this sense, the ability of peoples to group together and organise themselves militarily illustrates their wish to self-determine and even their ability to organise politically.

⁴⁷⁸ See eg Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (OUP 2004) 335; Marcelo G Kohen, *Secession: International Law Perspectives* (CUP 2006); Cara Nine, *Global Justice and Territory* (OUP 2012) 45-50.

⁴⁷⁹ Indeed, the self-determination of people has been traditionally viewed (both on historical and nationalist accounts) as a right of a self-determining group to secede territory from a state. However, self-determination is increasingly viewed as a right to self-determine internally, that is as a right to democratic governance. See eg *Reference re: Secession of Quebec* [1998] 2 SCR 217 (Supreme Court of Canada) para 130 (‘A state whose government represents the whole of the people or peoples resident within its territory, on basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity’).

⁴⁸⁰ Frederic Megret, ‘The Right to Self-Determination: Earned not Inherent’ in Fernando R Teson (ed), *The Theory of Self-Determination* (CUP 2016) 48, 54-59.

⁴⁸¹ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (3rd edn, Basic Books 2000) 93.

⁴⁸² *ibid.*

Such a broadened conception of self-determination seems to accommodate revolutionary struggles as remedial struggles based on non-territorial claims. In this sense, revolution is the only remedy available to people, united by a common perception of injustice, to end oppression and reinstate freedom. It is a freedom struggle against subjugation and intimidation from within, not from without. It is a freedom-fighting against internal enemy (authoritarianism) akin to the historical freedom-fighting waged against external enemy (colonialism). To claim that revolution is a (internal) form of realisation of self-determination is not only to do away with a biased assumption that only groups that are externally viewed as sufficiently 'stable', 'authentic' or 'sustainable' are privileged to be entitled to self-determine⁴⁸³ but also to return to the original meaning of self-determination as a freedom to lead one's life in one's own terms.⁴⁸⁴

That the right of armed revolution derives from the principle of self-determination has been recognised by a host of scholars.⁴⁸⁵ Illustratively, Paust observed, '[t]oday, the right of revolution is an important international precept and a part of available strategies for the assurance both of the authority of the people as the lawful basis of any government and of the process of national self-determination'.⁴⁸⁶ Similarly, Simma *et al* asserted that '[t]he right of self-determination supports in its essence any people fighting in its majority for democratic institutions of government [...] In a sense, it is coming back to its roots as a principle in support of revolutionary change'.⁴⁸⁷ Ultimately, Nahlawi and Marie affirmed that revolution represents the execution of an internal self-determination claim against oppression and dictatorship.⁴⁸⁸ Moreover, state practice of recognition of revolutionary movements either *in toto*, as in Ukraine, or partially as legitimate representatives of a people, as in Libya and Syria, because the pre-revolutionary government lost legitimacy, because peoples aspirations were legitimate and because the opposition group was representative, broad and enjoyed a reasonable prospect of permanence is not substantively different from national liberation movement's recognition.⁴⁸⁹

⁴⁸³ Frederic Megret, 'The Right to Self-Determination: Earned not Inherent' in Fernando R Teson (ed), *The Theory of Self-Determination* (CUP 2016) 57.

⁴⁸⁴ Indeed, it was the 1789 French revolution that set the origins of the modern principle of self-determination. See section 6.3. See also Elizabeth Rodriguez-Santiago, 'The Evolution of Self-Determination of Peoples in International Law' in Fernando R Teson (ed), *The Theory of Self-Determination* (CUP 2016) 205-08 (Claiming that the French revolution of 1789, just like the American and Latin American revolutions, was an exercise of internal self-determination).

⁴⁸⁵ See section 6.3.1 of this thesis.

⁴⁸⁶ Jordan J Paust, 'The Right to Revolution' in Richard Pierre Claude and Burns H Weston (eds), *Human Rights in the World Community: Issues and Action* (University of Pennsylvania Press 2006) 448.

⁴⁸⁷ Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol 1 (3rd edn, OUP 2012) 332.

⁴⁸⁸ Jean-Bernard Marie, 'Relations between Peoples' Rights and Human Rights: Semantic and Methodological Distinctions' (1986) 7 Hum Rts LJ 195, 203; Jasmine Nahlawi, 'Self-Determination and the Right to Revolution: Syria' (2014) 8 HR & ILD 84, 91.

⁴⁸⁹ See Dapo Akande, 'Self-Determination and the Syrian Conflict — Recognition of Syrian Opposition as Sole Legitimate Representative of the Syrian People: What Does This Mean and

This too speaks in favour of the close conceptual proximity between traditional wars of national liberation and contemporary revolutionary struggles.

From all the foregoing, it is clear that apart from battles against colonial domination, alien occupation and racist regimes, the concept of freedom-fighting has broadened to include other self-determination causes, such as fight against systemic and systematic violations of human rights and government oppression. In other words, revolutionary struggles for democracy and human rights constitute a modern variation of freedom-fighting.

6.5.3. Delineating the Second-Tier Framework for ‘Illegal but Justifiable’ Revolution by Reference to the Just War Theory

As have been previously ascertained, international practice evidences that legitimacy is an essential element of international law. Because both the substantive conception of legitimacy and global constitutionalism have similar objectives, namely promotion of flexibility of legal argument and law’s effective response to global challenges, global constitutionalism provides for the most suitable theoretical framework for incorporating the substantive legitimacy rationale, which is, in turn, based on an idea that when adhering to the letter of law would lead to the morally abhorrent outcomes, the violation of the fundamental norm of international law is only justified when carried out in observance with a stratum of secondary norms.⁴⁹⁰ Thus, the actor appealing to the legitimacy rationale is only freed from first-order legal constraints and is to adhere to second-order rules. If such violation of a first-tier norm involves recourse to violence, the reference is typically made to the second-tier principles of the just war theory (JWT),⁴⁹¹ most of which either constitute customary international law or have been widely codified in international humanitarian law (IHL) and the law of the use of force.⁴⁹² The impact of these

What Implications Does It Have?’ (*EJIL: Talk!*, 6 December 2012) <<https://www.ejiltalk.org/self-determination-and-the-syrian-conflict-recognition-of-syrian-opposition-as-sole-legitimate-representative-of-the-syrian-people-what-does-this-mean-and-what-implications-does-it-have/>> accessed 22 August 2017 (Arguing that such national liberation movements as ‘the Palestinian Liberation Organisation (PLO), the African National Council (ANC) in South Africa; the South West Africa People’s Organization (SWAPO) in Namibia; and the African Party for the Independence of Guinea and Cape Verde (PAIGC) in Guinea Bissau were all recognised as the legitimate (authentic or sole legitimate) representative of their respective peoples by the United Nations General Assembly’).

⁴⁹⁰ The Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000) 163-98.

⁴⁹¹ This is also recognised by Joseph C Sweeney, ‘The Just War Ethic in International Law’ (2003) 27 *Fordham Int’l LJ* 1865, 1865-66.

⁴⁹² Importantly, the just war doctrine is not the only way to regulate and mitigate the horrors of war. Other major ethical approaches include pacifism, realism and cosmopolitanism. See eg Michael Farrell, *Modern Just War Theory: A Guide to Research* (The Scarecrow Press 2013) 2-3. However, the JWT is the dominant and most influential ethical framework because it has deep philosophical roots, is highly flexible to account for a variety of methods and circumstances of war and represents the bedrock of international law governing the use of force.

principles is also felt in other (emerging) areas of international law, such as, for example, post-conflict settlement and reconstruction.

The IIC on Kosovo in its memorable verdict that the NATO military intervention in Kosovo was ‘illegal but legitimate’ because ‘all diplomatic avenues had been exhausted’, ‘because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule’⁴⁹³ and because the NATO ‘adhered to principles of discrimination, proportionality and necessity’⁴⁹⁴ evidenced that a set of just war principles was invoked to justify the otherwise unlawful intervention. The Commission called them ‘threshold principles that must be satisfied in order for any claim of humanitarian intervention to be legitimate’.⁴⁹⁵ As Tony Blair himself acknowledged, the war in Kosovo ‘is a just war, based not on any territorial ambitions but on values’.⁴⁹⁶ Prior to this, the Danish Institute of International Affairs suggested five ‘possible criteria’ for legitimate use of force for humanitarian cause, which were used by the IIC for elaborating its own principled framework for legitimate intervention. These largely incorporated ideas of the JWT, including legitimate cause, legitimate means and legitimate authority.⁴⁹⁷ Similarly, in a 2001 report on responsibility to protect, the recently-established Canadian-sponsored International Commission on Intervention and State Sovereignty identified a set of ‘precautionary criteria’ for justified military intervention for human protection purposes, including just cause, right authority, right intention, last resort, proportional means and reasonable prospect.⁴⁹⁸ Whilst the Commission acknowledged the uncertainty as to legal status of the principles concerned, it accepted their robust ethical importance in situations where the gap between legality and legitimacy reached unacceptable dimensions. By the same token, the elements of the JWT have been incorporated into the 2004 report by the Secretary-General Kofi Annan arguing that the SC should consider ‘five criteria of legitimacy’ when contemplating military intervention, such as seriousness of threat, proper purpose, last resort, proportional means and balance of consequences.⁴⁹⁹

⁴⁹³ The Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000) 4.

⁴⁹⁴ *ibid* 185.

⁴⁹⁵ *ibid* 194.

⁴⁹⁶ Tony Blair, ‘Doctrine of the International Community’ *PBS* (Chicago, 22 April 1999) <http://www.pbs.org/newshour/bb/international-jan-june99-blair_doctrine4-23/> accessed 10 November 2016.

⁴⁹⁷ Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects* (Gullanders Bogtrykkeri 1999) 106-11 (These included serious violations of human rights or humanitarian law; a failure by the UNSC to act; multilateral bases for the action undertaken; only necessary and proportionate force used; and the disinterestedness of intervening states).

⁴⁹⁸ ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Center 2001) 32ff.

⁴⁹⁹ UNGA ‘A More Secure World: Our Shared Responsibility. Report of the High-level Panel on Threats, Challenges and Change’ (2004) UN Doc A/59/565, 13.

The importance of the ethical principles in the debate on legitimacy of controversial conduct has also been underscored by a number of scholars. For instance, Falk insisted that ‘claims of legitimacy should be implemented only in exceptional circumstances, and then within a *framework of principled restraint*’.⁵⁰⁰ He further maintained that ‘whenever the [legal] straitjacket is loosened in response to moral and functional imperatives, the resulting behaviour continues to be constrained by *secondary rules*’.⁵⁰¹ Likewise, Honore claimed in the context of the right of resistance that ‘given *certain conditions*, there is indeed a right to rebel, a right which has some claim to a recognised place in international law and political morality’.⁵⁰² The recent works by Megret and Marsavelski are even more pronounced on the second-tier setting for revolution stating that a set of just war principles is to be followed if revolutionary force is to be recognised legitimate and, thus, distinct from other less benevolent forms of non-state violence.⁵⁰³ It follows that the *legitimacy* of the formula ‘illegal but legitimate’ is predicated upon the adherence to a set of second-tier rules, which derive from the JWT. Applied to revolutionary violence, it follows that the right to ‘illegal but justifiable’ revolution is only activated when primary human rights are abridged (legitimate cause) and other channels of action are not effective or non-existent (last resort). Moreover, in order to claim legitimacy revolutionary violence shall abide by relevant norms of international law (legitimate means) and be carried out in the interests of the people and with their support (legitimate authority). In other words, the just war principles constitute a framework of second-order legal constraints adherence to which legitimises the violation of first-order legal constraints.

Before turning to a closer examination of the principles of the just war tradition in the context of the right to revolution, it is worth pausing to consider the legal significance of this doctrine in modern international law and its applicability to non-state use of force. The just war tradition is a broad concept that developed and evolved over centuries and comprises a plurality of just war theories and sub-traditions — secular, divine, legal, moral etc. — which share three common factors: (1) there should be restrictions on the resort to war as well as the conduct of war; (2) they all derive from Western philosophical traditions; (3) they all crystallised over a set of principles seeking to regulate the resort to war, or *jus ad bellum* (just cause, right authority, right intention, proportionality of ends, last resort, reasonable prospect of success), the conduct

⁵⁰⁰ Richard Falk, ‘Introduction: Legality and Legitimacy. Necessities and Problematics of Exceptionalism’ in Richard Falk, Mark Juergensmeyer and Vesselin Popovski (eds), *Legality and Legitimacy in Global Affairs* (OUP 2012) 4 (emphasis added).

⁵⁰¹ *ibid* 7 (emphasis added).

⁵⁰² Tony Honore, ‘Right to Rebel’ (1988) 8 Oxford J Leg Stud 34, 38 (emphasis added).

⁵⁰³ Frederic Megret, ‘Beyond “Freedom Fighters” and “Terrorists”: When, if Ever, is Non-State Violence Legitimate in International Law’ (6 April 2009) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1373590> accessed 20 October 2016; Aleksandr Marsavelski, ‘The Crime of Terrorism and the Right of Revolution in International Law’ (2013) 28 Conn J Int’l L 241, 278-85.

of war, or *jus in bello* (proportionality of means, noncombatant immunity, necessity), and, increasingly, the cessation of war, or *jus post bellum* (right vindication, elimination of unjust gains, punishment, demilitarisation and political rehabilitation).⁵⁰⁴ Importantly, the range and content of these principles are constantly in flux, some become obsolete whereas others emerge or change their scope, and there is no consensus within the scholarly community on their exact ramifications and regulative role. Yet, given their long historical pedigree, universal reach and solid philosophical underpinnings, these principles exert a strong (moral) impact within any legal debate on the legitimacy of violence, whether in state-versus-state context or non-state-versus-state context.

Illustratively, the fulfilment of the UN's stated purpose 'to save succeeding generations from the scourge of war', 'to reaffirm faith in fundamental human rights' and 'to ensure [...] that the armed force shall not be used, save in the common interest'⁵⁰⁵ is dependent on the ethical paradigm (of the JWT) for making morally legitimate decisions whenever violence is concerned. Moreover, one of the primary purposes of the UN is to 'take effective collective measures' in relation to the maintenance of international peace and security 'in conformity with the principles of justice and international law'.⁵⁰⁶ The inclusion of justice in this provision supports the idea that the UN Charter can be viewed as an instrument for the implementation of the just war. In other words, the so-called 'neo-just war doctrine' — an altered version of the original JWT limited to *defensive* causes — provides an intellectual basis for the operation of the UN. As Claude observed, with the creation of the UN 'came the development of secular replacements for the ecclesiastical accoutrements of the medieval just war doctrine: [...] the United Nations serves as church, the secretary-general as Pope, and the doctrine of collective security as theological creed of the twentieth-century community of saints that is sometimes known as the multistate system'.⁵⁰⁷ Moreover, the large portion of the just war principles has been codified in the major subject areas of international law (IHL and the law on the use of force) as well as have been crystallised into customary international law. Whilst this by no means suggests that the just war principles now *per se* constitute a part of positive international law (unless the principle attained the status of a treaty or customary law), they do imply that in situations where the gap between what legality requires and what morality ordains reaches unacceptable dimensions, violations of the first-order rules can be justified if committed in adherence to the second-tier ethical

⁵⁰⁴ Eric A Heinze and Brent J Steele, 'Introduction: Non-state Actors and the Just War Tradition' in Eric Heinze and Brent J Steele (eds), *Ethics, Authority, and War: Non-State Actors and the Just War Tradition* (Palgrave Macmillan 2014) 4-7; Seth Lazar, 'War', *The Stanford Encyclopaedia of Philosophy* (Spring edn, 2016) <<http://plato.stanford.edu/entries/war/index.html#ref-1>> accessed 26 October 2016.

⁵⁰⁵ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, preamble.

⁵⁰⁶ *ibid* art 1(1).

⁵⁰⁷ Inis L Claude, 'Just Wars: Doctrine and Institutions' (1980) 95 Pol Sci Q 83, 92.

constraints. This evidences the revival of the medieval just war thinking in the twenty-first century⁵⁰⁸ — an empirical affirmation of the substantive legitimacy thesis's progressive punch.

Albeit historically the JWT has been dominated by statist, on a purely ethical level, the application of the doctrine to non-state actors seems unproblematic considering the fact that it predates the advent of the modern state system, which was only institutionalised in the seventeenth century. However, the traditional legal doctrine of statehood entailing that states hold a monopoly on the legitimate use of force within their territories⁵⁰⁹ seemingly imposes legal constraints on the applicability of the JWT to non-state entities. Legitimation of groups standing in violent opposition to states would imply, *inter alia*, the illegitimacy of state, an erosion of state authority, or the legitimacy of using force against the state. Yet, a set of contemporary legal norms enshrined in, for example, the 1977 Protocol I to the Geneva Conventions and the two 1966 Covenants (the right to self-determination) suggest that non-state movements can have certain rights and obligations appertaining to the use of force. Because having certain rights and obligations under international law is distinct from possessing international legal personality, legitimising limited patterns of non-state violence does not jeopardise the notion of statehood. Indeed, if states may employ 'violence strategically for political ends on a regular basis — to maintain public order and national security' and such violence is ordinarily considered lawful, 'the possibility must remain that some forms of political violence can be *justifiable*, and thereby escape condemnation as "terrorism".'⁵¹⁰ The gist of the JWT is, hence, to delineate the criteria of justifiability of violence irrespective of the type and/or status of the actor.

Thus, while it is now established that the JWT can be applied to non-state violence, it is still unclear whether it is equally applicable to violence not attaining the level of an armed conflict or violence which is (deliberately) characterised as falling short of war, which is often the case with revolution and terrorism. Since, the nature of conflict has dramatically changed since the end of World War II, where traditional wars waged between nations employing conventional forces have been increasingly substituted by so-called

⁵⁰⁸ *ibid* 94 ('We have returned to the medieval view that it is permissible and perhaps even desirable — and, conceivably, even mandatory — to fight to promote justice, broadly conceived'). The return to the medieval just war idea is also recognised by Graham who observes that the modification of IHL allowing national liberation movements to use force in defence of what they perceive as just (self-determination) is a manifestation of the return to the eleventh-century concept of just war. David E Graham, 'The 1974 Diplomatic Conference on the Law of War: A Victory for Political Causes and a Return to the "Just War" Concept of the Eleventh Century' (1975) 32 Wash & Lee L Rev 25, 44.

⁵⁰⁹ Max Weber has famously defined 'state' as an institution that 'successfully claims the monopoly of the legitimate use of physical force within a given territory'. Max Weber, 'Politics as a Vocation' in Bryan S Turner and others (eds), *From Max Weber: Essays in Sociology* (Routledge 1991) 77.

⁵¹⁰ Clive Walker, 'Case Comment: R v Gul: Trial — Terrorism — Disseminating Terrorist Publications' (2012) Criminal L Rev 645, 648 (emphasis added).

‘asymmetric conflicts’, in which the notion of combatants is ever more attenuated, it is fair to suggest that such conflicts should fall within the purview of the just war principles, even if the JWT has to revise some of its premises to accommodate such conflicts. As Whitman observes, ‘JWT possesses the necessary conceptual tools to deal with whatever changes in global politics and war-fighting methods demanded in these allegedly new circumstances’. For him, ‘[t]o abandon [...] a system of moral and legal norms that has been built up over more than a thousand years, and painstakingly codified into international law over several hundred years’ would be ‘extremely shortsighted’.⁵¹¹ This notwithstanding, it is commonly asserted that stretching the boundaries of ‘war’, so that war encapsulates a wider quantum of incidents, may result in actual sanctioning of more killings and destruction because the JWT is precisely designed to deal with situations of war and its requirements of proportionality, discrimination and necessity are less effective in protecting life than the laws of peace, such as IHRL. The importance of this point is obvious. However, the difficulty lies in the fact that the judgement on whether a certain incident of violence can be characterised as war lies primarily on states and is more often than not negative. Consequently, one is either to accept that revolutionary force is always war or to apply different frameworks with respect to war-like revolutions and revolutions falling short of armed conflicts. The second approach is preferred in this work. It means that whilst the core principles of the JWT are applicable in both traditional warfare and asymmetric conflicts as long as armed force is concerned, the particularities of, and legal grounds for, their application come from different normative frameworks: the laws of war with respect to the former and the laws of peace to the latter. All in all, the pertinence of the JWT to the debate on revolution *qua* legitimate violence as opposed to terrorism is hard to overestimate, particularly considering the fact that most of its core principles have found their way into positive international law.

It is perhaps worth noting here that an attempt to justify non-state political violence through the recourse to the just war principles is not novel as such.⁵¹²

⁵¹¹ Jeffrey P Whitman, ‘Is Just War Theory Obsolete?’ in Fritz Allhoff, Nicholas G Evans and Adam Henschke (eds), *Routledge Handbook of Ethics and War: Just War Theory in the Twenty-First Century* (Routledge 2013) 24.

⁵¹² See eg Nicholas N Kittrie, *Rebels with a Cause: The Minds and Morality of Political Offenders* (Westview Press 2000); Tony Coady and Michael O’Keefe, *Terrorism and Justice: Moral Argument in a Threatened World* (Melbourne University Publishing 2003); Shannon F French, ‘Murderers, Not Warriors: The Moral Distinction Between Terrorists and Legitimate Fighters in Asymmetric Conflicts’ in James P Sterba (ed), *Terrorism and International Justice* (OUP 2003); Igor Primoratz, *Terrorism: The Philosophical Issues* (Palgrave Macmillan 2004); Frederic Megret, ‘Beyond “Freedom Fighters” and “Terrorists”: When, if Ever, is Non-State Violence Legitimate in International Law’ (6 April 2009) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1373590> accessed 20 October 2016; Aleksandr Marsavelski, ‘The Crime of Terrorism and the Right of Revolution in International Law’ (2013) 28 Conn J Int’l L 241; Fritz Allhoff, Nicholas G Evans and Adam Henschke (eds), *Routledge Handbook of Ethics and War: Just War Theory in the Twenty-First Century* (Routledge 2013); Eric A Heinze and Brent J Steele, *Ethics, Authority, and War: Non-State*

Yet, the principal contribution of the present work is the development of solid theoretical foundations for such an enterprise based on the evolving concept of legitimacy in international law. Thus, the significance of the present framework for ‘illegal but justifiable’ revolution is that it is not merely morally-laden as is often the case with the existing literature on the subject but is also situated within the appropriate limits of legal discourse. In what follows, the principled second-tier framework for ‘illegal but justifiable’ revolution is constructed against the backdrop of the concept of terrorism, as the most prominent illegitimate form of political violence, and by reference to such just war principles as legitimate cause, legitimate means, legitimate target as well as a set of legitimate conditions, such as subsidiarity, legitimate authority and reasonable prospect of success. The central claim of this section is that revolution is ‘illegal but justifiable’ whenever it is undertaken in defence of human rights (legitimate cause), abides by the relevant norms of international law (legitimate means), targets representatives of oppressive regime (legitimate target), is exercised as a means of last resort (subsidiarity) and represents aspirations of the majority of population (legitimate authority).

6.5.3.1. Legitimate Cause

According to the JWT, war should only be fought against aggressors, whether in self-defence or in furtherance of human rights.⁵¹³ Thus, self-defence and defence of others are the key grounds for the justification of war. Because motive remains a paradigmatic feature of terrorism, it is fair to suggest that the main criterion to distinguish acts of terrorism from acts of legitimate struggles for freedom is the underlying motive, or cause. Whereas terrorists’ principal intent is to incite a state of terror in the mind of some persons, the overriding rationale of freedom fighters is self-defence against governmental abuse and vindication of human rights. In other words, whereas terrorism is a tactic, ‘freedom-fighting’ is the justification.

One may, however, legitimately object by stating that terrorist’s cause is also political and can similarly be wrapped in the mantle of self-defence and freedom against oppression. As Derrida has astutely noted, ‘[e]very terrorist in the world claims to be responding in self-defence to a prior terrorism on the part of the state, one that simply went by other names and covered itself with all sorts of more or less credible justifications’.⁵¹⁴ Be this as it may, the key

Actors and the Just War Tradition (Palgrave Macmillan 2014); David C Rapport and Yonah Alexander, *The Morality of Terrorism: Religious and Secular Justifications* (Pergamon 2015).

⁵¹³ For a good discussion of how the content of just cause has evolved in international law, see generally Joachim von Elbe, ‘The Evolution of the Concept of the Just War in International Law’ (1939) 33 AJIL 665. Many other causes have been claimed to justify war. Yet, they are more contested. See Michael Farrell, *Modern Just War Theory: A Guide to Research* (The Scarecrow Press 2013) 16.

⁵¹⁴ Jacques Derrida, ‘Autoimmunity: Real and Symbolic Suicides’ in Giovanna Borradori (ed), *Philosophy in a Time of Terror. Dialogues with Jurgen Habermas and Jacques Derrida* (University of Chicago Press 2003) 103.

distinction is that the legitimacy of such cause (second-order motive) is overshadowed by the illegitimacy of the immediate intent to seriously intimidate a population (first-order motive). In this sense, the immediate intent to inflict violence as the means to a greater end, has become an end in itself. Another possibility would be to regard the first-order motive, or terror, as means and the second-order motive, or freedom, as a goal. Because legitimate goal cannot justify illegitimate means, the overall cause is illegitimate. Moreover, the legitimacy of goal is also dubious since '[t]errorists usually aren't fighting for anyone's freedom. Instead, they're usually fighting for their own chance to be tyrants, hence their disregard even for the lives of the people they may claim to be "liberating"'.⁵¹⁵

Yet, there is a danger in viewing motive as the preponderant criterion for distinguishing terrorists from freedom fighters. It is all too often the case that parties to an armed conflict, particularly those involving armed groups fighting against government forces, commit acts with a view to compel a government to do or to refrain from doing any act. Thus, as long as IHL is concerned, acts that are lawful according to the laws of war cannot be criminalised as terrorist irrespective of their cause.⁵¹⁶ To put it slightly differently, because IHL already prohibits most acts that would be considered 'terrorist' if committed in peacetime it is untenable to speak about terrorism in armed conflict but solely about war crimes, crimes against humanity and other grave breaches of humanitarian law. It seems, thus, that the discussion about the distinction between terrorists and freedom fighters in times of war is redundant. This is confirmed by an approach of certain sectoral treaties on terrorism to explicitly exclude from their scope of application situations of armed conflict regulated by IHL.⁵¹⁷ This notwithstanding, the treaty rules 'show that acts can be both,

⁵¹⁵ Harjit Sandhu, cited in Alex P Schmidt, 'Introduction' in Alex P Schmidt (ed), *The Routledge Handbook of Terrorism Research* (Routledge 2011) 21.

⁵¹⁶ On the concern by the ICRC that the draft convention may criminalize acts lawful under IHL, see ICRC Report, 'Terrorism and International Law: Challenges and Responses: The Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law' (ICRC 2002) 5.

⁵¹⁷ International Convention Against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205 (Hostage-Taking Convention) art 12; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 221 (Safety of Maritime Navigation Convention) preambular para 1, art 2(1)(a); Convention on the Marking of Plastic Explosives for the Purpose of Detection (adopted 1 March 1991, entered into force 21 June 1998) 2122 UNTS 359, preambular para 1, arts III(2), IV(2) and (3); International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256 (Terrorist Bombings Convention) preambular paras 1, 11, art 19; International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197 (Terrorist Financing Convention) art 21; International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, entered into force 7 July 2007) 2445 UNTS 89, preambular paras 1, 10, 13, art 4(1) and (2).

acts of war and at the same time terrorist acts'.⁵¹⁸ Consider, for example, article 33 of the 1949 Fourth Geneva Convention which provides that 'collective penalties and likewise all measures of intimidation or of terrorism are prohibited'.⁵¹⁹ Similarly, article 51(2) of the 1977 First Additional Protocol to the Geneva Conventions prohibits 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population'.⁵²⁰ To solve this conundrum, it has been suggested that only acts of terrorism aimed to spread terror among persons taking no active part in hostilities shall be considered as terrorist.⁵²¹ Moreover, whenever there is conflict between terrorism conventions and IHL, it is possible to argue that IHL as the *lex specialis* trumps other conflicting norms. Importantly, the draft UN Comprehensive Convention supports this view: 'The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by the present Convention'.⁵²²

Because it is a well-established practice among states to refrain from characterising situations of internal unrest, such as revolutions, as armed conflicts precisely in order to avoid the application of the laws of war, it is more compelling to draw a distinction between terrorism and legitimate struggles against oppressive governments in times of peace. As Condorelli and Naqvi pointedly observed, '[i]t would be desirable that such an approach to a rule prohibiting terrorist acts, which forbids the act or threat of terror against the civilian population regardless of scale or motive, also influenced the attempts to define terrorism outside the domain of the *jus in bello*'.⁵²³ Yet, the traditional divide between western states that are opposed to any type of exception to the scope of the crime of terrorism dependent on the political cause of the perpetrator and countries of the Arab League, the OIC and the AU, which advocate for such an exception, can be regarded as the main obstacle to reaching an agreement on a common definition of terrorism and the criteria of its differentiation from freedom-fighting based on legitimate cause.

This notwithstanding, international law has long embraced a certain core of grounds on which violence by non-state actors remains legitimate. One of

⁵¹⁸ Silja Vöneky, 'The Fight against Terrorism and the Rules of the Law of Warfare' in Christian Walter and others (eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Springer 2004) 929.

⁵¹⁹ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GC IV) art 33.

⁵²⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 17512 (Geneva Protocol I) art 51(2).

⁵²¹ See Andrea Bianchi and Yasmin Naqvi, *International Humanitarian Law and Terrorism* (Hart Publishing 2011) 196ff.

⁵²² Draft Comprehensive Convention against International Terrorism, UN Doc A/59/894 (12 August 2005) art 20(2).

⁵²³ Luigi Condorelli and Yasmin Naqvi, 'The War Against Terrorism: Are the Geneva Conventions Out of Date?' in Andrea Bianchi (ed), *Enforcing International Law Norms Against Terrorism* (Hart Publishing 2004) 28.

these is a so-called ‘right of self-defence’. Whilst it has been previously established that the status of the notion of personal self-defence is ambiguous in international law, political history reveals that humanity has always recognised that individuals should have the right to defend themselves from violence. It has been therefore suggested that the right in question is now a general principle of international law by virtue of its wide endorsement in all major legal and philosophical traditions as well as its direct acceptance in such paradigmatic branches of international law as the law of the use of force, the law of state responsibility and criminal law.⁵²⁴ That the principle of self-defence is an essential element of common legal conscience was also confirmed in the context of the 2013-14 Ukrainian revolution, where a former head of the Ukrainian Greek Catholic Church Lyubomyr Guzar attested that the Euromaidan revolution is justifiable because under the ‘law of nature’ individual and every nation has a right to self-defence: ‘[O]ne may resort to arms when facing arms’.⁵²⁵

In order for self-defence to be invoked, oppression should amount to substantial violations of internationally recognised human rights. However, if one accepts an idea that revolution is not only a part of international law but also transcends all domestic legal systems as a general principle of law, then serious and flagrant violations of domestic constitutions are also sufficient to justify revolution. Violations are substantial whenever they are continuous and affect peoples massively. The most obvious cases are genocide, crimes against humanity, war crimes and ethnic cleansing, since even international responsibility (to protect) is engaged when they are infringed.⁵²⁶ If the international community may claim a right to use military force in such extreme cases, it is logical to assume that victims of these atrocities can protect themselves by the same violent means. In fact, such bottom-up self-help is more efficient than international intervention because, apart from being people-based and empowering, it is more likely to arise immediately and in direct response to patterns of violence, it benefits from considerable knowledge of terrain and avoids making complex moral choices, such as who should be saved first and what degree of sacrifice is acceptable.⁵²⁷ Violations of human rights that do not reach the level of the above-mentioned crimes can also be

⁵²⁴ See section 6.3.2.

⁵²⁵ Lyubomyr Guzar, ‘Pravo na povstannya — to ye zakon pryrody’ *Ukraina Moloda* (10 January 2011) <<http://www.umoloda.kiev.ua/number/2395/180/85201/>> accessed 30 June 2016. See also SP Pogrebnyak and EA Uvarova, ‘Soprotivlenie ugneteniyu. Povstanie. Revolyuciya (teoretiko-pravovoy analiz v svete doktriny prav cheloveka)’ [Resistance to Oppression. Rebellion. Revolution (Theoretical-legal Analysis in Light of the Doctrine of Human Rights)] (2013) 2 *Pravo i gromadyanske suspilstvo* 4, 25.

⁵²⁶ UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, para 139 (‘The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity’).

⁵²⁷ Frederic Megret, ‘Beyond the “Salvation” Paradigm: Responsibility to Protect (Others) vs the Power of Protecting Oneself’ (2009) 40 *Sec Dialogue* 575, 584.

regarded as substantial if they touch upon interests that ‘are felt to be crucial by [...] the individual[s] who suffer [...] from being deprived of them’,⁵²⁸ perpetuated continuously and *en masse*.

Another ground on which non-state violence can be justified is the principle of self-determination. The principle has developed around the notion of legitimate cause and its substantive scope is evolving continuously. Such traditional ‘just causes’ as struggles against colonial domination, alien occupation and racist regimes are being overtaken by more contemporary political struggles, such as for human rights and greater democracy.⁵²⁹ Violent resistance to sustained human rights violations can, thus, be regarded as the extreme realisation of internal self-determination.⁵³⁰ This view is rather contested⁵³¹ but it finds support in the text of the 1970 Declaration on Friendly Relations,⁵³² which is now commonly viewed as reflecting customary international law. Whilst the wording of the Declaration is aversive to the dismemberment of states, it is only so when the latter respect the principle of self-determination. If states act contrary to their people’s aspirations, they forfeit their right to (internal) sovereignty and territorial integrity in that ‘group which forms a unit of self-determination can resort to force to make good their right’.⁵³³ The Declaration further states that ‘[i]n their actions against, and resistance to, such forcible action [which deprives peoples of their right to self-determination] in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter’.⁵³⁴ In other words, the text of the Declaration seems to recognise the legitimacy of the cause of people acting forcibly (by means of revolution) against their governments in pursuit of their right to self-determination. This is reaffirmed in the UDHR, which characterises the lack of protection of human rights as a circumstance justifying rebellion: ‘[I]t is essential if man is not to be compelled to have

⁵²⁸ Tony Honore, ‘Right to Rebel’ (1988) 8 Oxford J Leg Stud 34, 51.

⁵²⁹ See James Summers, *Kosovo: A Precedent? The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self-Determination and Minority Rights* (Brill 2011); Elizabeth Chadwick, ‘Terrorism and Self-Determination’ in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar 2014) 301.

⁵³⁰ Jasmine Nahlawi, ‘Self-Determination and the Right to Revolution: Syria’ (2014) 8 HR & ILD 84, 91. See also Stefan Talmon, ‘Recognition of Opposition Groups as the Legitimate Representative of a People’ (2013) 12 Chinese JIL 219, 236.

⁵³¹ See eg Marc J Bossuyt, *Guide to the ‘Travaux Préparatoires’ of the International Covenant on Civil and Political Rights* (Martinus Nijhoff 1987) 24, 32.

⁵³² Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970).

⁵³³ Tony Honore, ‘Right to Rebel’ (1988) 8 Oxford J Leg Stud 34, 44.

⁵³⁴ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970).

recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'.⁵³⁵

One should also be reminded of the 1977 Protocol I to the Geneva Conventions, which extended the applicability of rules relating to international armed conflicts to situations that include people's struggles in the name of self-determination. In this sense, the legitimacy of cause (self-determination) is the ground for the full applicability of the laws of war, including a (privileged) combatant status, to the non-state use of force. To put more bluntly, the legitimacy of anti-governmental force can be recognised on the basis of the legitimacy of a cause.⁵³⁶ Interestingly, here one can see a conflation of *jus ad bellum* with *jus in bello*, since the motive behind a conflict is the criterion for the application of IHL.

It follows that self-defence against state oppression and self-determination struggles for human rights and democracy constitute legitimate causes justifying non-state violence, assuming that other criteria are met.

6.5.3.2. Legitimate Means

The second criterion imposed upon non-state actors employing violence is the legitimacy of means used. Violence that does not abide by certain standards is illegitimate by definition irrespective of the legitimacy of cause. To the extent that the violence attains the level of an armed conflict, IHL is applicable. There are certain guarantees in IHL with respect to non-state actors that imply the lawfulness, or, more precisely, the permissibility, of revolutionary violence if effectuated in conformity with international humanitarian norms. Importantly, whilst IHL is designed to serve neutral humanitarian purposes and not to confer legitimacy and/or legality upon actors taking part in hostilities,⁵³⁷ it provides humanitarian protection to warring parties by according to them a belligerent status, meaning that persons meeting the requisite criteria for designation as combatant will not be punished for legitimate acts of war. Thus, adherence to the laws of war implies that violence cannot as such be considered terroristic. That said, IHL explicitly confers a (privileged) combatant status to such warring non-state actors as members of a *levée en masse*⁵³⁸ and peoples 'fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'.⁵³⁹ It has been earlier ascertained that non-state use of force in furtherance of revolution falls

⁵³⁵ Universal Declaration of Human Rights, UNGA Res 217(III)A (10 December 1948) preamble.

⁵³⁶ For a more detailed discussion, see section 6.3.4.

⁵³⁷ To say that a non-state group has right and duties when it participates in war (*jus in bello*) is not the same as saying that it has the authority to initiate a war (*jus ad bellum*).

⁵³⁸ Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GC III) art 4.

⁵³⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 17512 (Geneva Protocol I) art 1.

under the scope of article 1 of Geneva Protocol I (peoples fighting in the exercise of their right of self-determination) and, thus, a full array of the laws of war is applicable to revolutions making it to the level of an armed conflict.⁵⁴⁰ Be that as it may, this does not strip liberation movements from an obligation to adhere to the minimum humanitarian standards of legitimate warfare.

The most relevant principles of IHL regulating the means and methods of waging war are proportionality, distinction and military necessity. The principle of proportionality implies that the inflicted harm should be proportional to the goals sought, thus prohibiting destruction that goes beyond that which is required to achieve the military goal. It prohibits certain means and methods of warfare that cause unnecessary suffering to both combatants and noncombatants⁵⁴¹ as well as prohibits the employment of certain weapons that cause unnecessary suffering.⁵⁴² The principle of distinction, also known as the principle of noncombatant immunity, dictates that only combatants and 'legitimate military objectives' may be deliberately targeted.⁵⁴³ Finally, the principle of military necessity provides that collaterally harming noncombatants can only be permissible if not inflicted intentionally and if reasonable precautions are taken to minimise the harm.⁵⁴⁴ Non-state use of force employed in adherence to these principles cannot by definition be terroristic. Whilst the adherence to the fundamental humanitarian principles does not indulge non-state warring groups with legitimacy, particularly considering the fact that there is no consensus on whether Protocol I is applicable to broader spectrum of wars than a strictly delineated set of causes, such as colonial domination, alien occupation and racist regimes, obeying IHL undeniably makes violence by such actors more legitimate than violence by those reneging upon such minimum requirements. As Ben Saul admitted, the universal application of Protocol I would exclude legitimate liberation movements from the scope of terrorism.⁵⁴⁵

If the laws of war do not apply or states are unwilling to apply those does not necessarily suggest that violence arising outside of armed conflict is illegitimate because it would mean that international law paradoxically condones more rather than less violence by only recognising as legitimate struggles making it to the level of an armed conflict. It is unclear how the

⁵⁴⁰ See section 6.3.4.

⁵⁴¹ See eg Geneva Protocol I, arts 8(a) and (b), 45(1) and (2), 51(5)(b); Third Geneva Convention, art 5(2).

⁵⁴² (Hague) Regulations Respecting the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 187 CTS 227, art 23(a); Geneva Protocol I, art 54(2); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Geneva Protocol II) art 14; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (adopted 10 April 1972, entered into force 26 March 1975) 1015 UNTS 163 (Biological Weapons Convention).

⁵⁴³ Geneva Protocol I, arts 48, 52.

⁵⁴⁴ *ibid* art 52.

⁵⁴⁵ Ben Saul, *Defining Terrorism in International Law* (OUP 2006) 78.

legitimacy of means can be assessed in situations short of an international armed conflict. Of course, certain provisions of IHL can be drawn by analogy but their application to events such as revolutions is complicated by the fact that the latter's principle goal is not to defeat an enemy but to uphold fundamental human rights against an oppressor. Needless to say, domestic law is largely irrelevant due to the fact that states are rather unwilling to codify by means of a statutory law situations in which law can be violated or the established constitutional order overthrown. Even less so are authoritarian states. Hence, recourse should be had to the international laws of peace, the most obvious framework being IHRL.

Whilst IHRL is essentially averse to violence, it recognises a need to balance between various human rights, that is restricting certain rights may be permissible, even necessary, in order to secure other rights. Such restrictions do not stand in conflict with the idea of a right but constitute pieces of the complex definition of the 'positive legal right'.⁵⁴⁶ As McGoldrick noted, 'the idea of limitations is based on the recognition that most human rights are not absolute but rather reflect a balance between individual and community interests'.⁵⁴⁷ In fact, states are justified to use violence against their subjects, up to killing them, if the interests of public order and/or national security so require. Moreover, individual violence can be justified in limited situations of self-defence and necessity under criminal law. As Ignatieff pointed out, 'human rights are not an ethic of quietism',⁵⁴⁸ and in certain cases deprivations of life are justified, namely in self-defence, in combat and in law enforcement.⁵⁴⁹ Thus, assuming that the violence employed by non-state actors pursues legitimate cause and there must be some constraint on the means used even in the situations falling short of an armed conflict, one can draw an analogy with the provisions of IHRL imposing restrictions on the use of state violence (particularly considering the capability of states to derogate from certain human rights obligations in situations of national emergency) as well as international criminal law restrictions on the use of violence by individuals in self-defence and necessity. Since the latter regime has been extensively discussed in the context of revolution as self-defence,⁵⁵⁰ it is reasonable to focus on the IHRL framework only.

⁵⁴⁶ Gerald L Neuman, 'Constrained Derogation in Positive Human Rights Regimes' in Evan J Criddle (ed), *Human Rights in Emergencies* (CUP 2016) 19 ('Whether the authorisation to derogate makes the positive legal embodiment of the right unfaithful to the authentic suprapositive content of the right is a different question: a positive legal right that is phrased as absolute under normal conditions may not actually correspond to an absolute moral right').

⁵⁴⁷ Dominic McGoldrick, 'The Interface Between Public Emergency Powers and International Law' (2004) 2 ICON 380, 383.

⁵⁴⁸ Michael Ignatieff, 'Human Rights, the Laws of War, and Terrorism' (2002) 69 Social Research 1137, 1151; Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Edinburgh UP 2005) 90-92.

⁵⁴⁹ See eg European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 005 (ECHR) art 2(2).

⁵⁵⁰ See section 6.3.2.2.

In IHRL, the legitimate encroachments upon human rights are allowed under two regimes: limitations and derogations. Whilst limitations are an inherent feature of IHRL aimed to balance individual interests with public goals, derogations are exceptional measures which are only allowed in extraordinary circumstances of national crisis and are of a temporary character. Limitations are either put into a general provision⁵⁵¹ or are adjoined to individual articles.⁵⁵² Their distinctive feature is a four-prong proportionality test: (1) whether the governmental action pursued legitimate aim, (2) whether the means employed was suitable, (3) whether the governmental action was necessary in democratic society and (4) whether the action in question was proportional to the goal sought.⁵⁵³ The institution of a state of emergency, in the meanwhile, allows a state to derogate from an existing (human rights) obligation to respond to what it perceives as a threat to its security and public order. It is enshrined in several human rights treaties and national laws, including constitutions. The proportionality test is also a crucial tenet of the regime of states of emergency. For instance, article 4 ICCPR lays down the rule that derogations may only be made to 'the extent strictly required by the exigencies of the situation'.⁵⁵⁴ A similar test is envisaged in article 15 ECHR⁵⁵⁵,

⁵⁵¹ Universal Declaration of Human Rights, UNGA Res 217(III)A (10 December 1948) art 29 ('(1) Everyone has duties to the community in which alone the free and full development of his personality is possible. (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations'); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (ACHPR) art 27 ('1. Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community. 2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest').

⁵⁵² See eg European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 005 (ECHR) arts 8, 9, 10 and 11.

⁵⁵³ For a more detailed discussion, see Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Colum J Transnat'l L 73, 77.

⁵⁵⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 4.

⁵⁵⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 005 (ECHR) art 15(1) ('In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law').

article 27 ACHR⁵⁵⁶ and article 4 of the Arab Charter.⁵⁵⁷ Other elements of the derogations regime include: (1) a threshold of severity cause, (2) the obligation of notification, (3) the consistency of the derogation with other international obligations, (4) non-discrimination and (5) the protection of non-derogable rights.⁵⁵⁸ The regimes of limitations and derogations tend to overlap with many of the same legal principles applicable, such as, e.g., proportionality, necessity and non-discrimination. Applied to non-state actors, this would mean that the use of force should be strictly necessary and proportional to the goal sought and encroachments on the rights of others can only be allowed to the extent 'necessary in a democratic society'.⁵⁵⁹ The criterion of democratic society is the most complicated and includes a variety of factors in the different international and regional jurisdictions. The two key elements include requirements that any action affecting the full realisation of human rights serves a pressing social need and the reasons therefore are relevant and sufficient.

Certainly, drawing an analogy between state and non-state violence may be deceptive and even aversive to some since non-state actors, unlike states, do not have a police force or a system of courts to ensure due process. Moreover, from a moral perspective, what distinguishes state violence, or in more appropriate terms 'state enforcement', from non-state violence is the former's regularity and predictability. It means that it is rule-governed, and people are able to foresee when and in what quantities it would be applied to them. Non-state violence, on the other hand, is unpredictable and its employment is not legally circumscribed. Such a morally-laden distinction weighs against the possible justification of non-state violence even when constraints on state force are applied by analogy to non-state actors. However, the moral justification for the state monopoly to use force is theoretically based on its capability to protect human rights and the rule of law. Moreover, such monopoly has been historically accepted on a condition that individuals retain

⁵⁵⁶ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) art 27(1) ('In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin').

⁵⁵⁷ League of Arab States, Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) 12 IHR Rep 883, art 4. By contrast, the other principal regional human rights instrument, the ACHPR, does not include a derogation clause. African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (ACHPR).

⁵⁵⁸ See eg Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergencies* (University of Pennsylvania Press 1994) 55; Scott P Sheeran, 'Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine and Politics' (2013) 34 Mich J Int'l L 491, 507.

⁵⁵⁹ Frederic Megret, 'Beyond "Freedom Fighters" and "Terrorists": When, if Ever, is Non-State Violence Legitimate in International Law' (6 April 2009) 19 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1373590> accessed 20 October 2016.

their right to self-defence where state cannot do so. When state behaves arbitrarily by massively violating constitutionally guaranteed rights of its subjects, ‘the distinction between force and violence breaks down, and it becomes a matter of choice whether we speak of the violence of the state’s agents or the force of those who resist them’.⁵⁶⁰ To negate this inherent right of resistance is to pose a threat to the foundations of the *Rechtsstaat*.⁵⁶¹

The conceptual similarity between the state of emergency and personal self-defence (in criminal law) has also been underscored by the International Commission of Jurists, which suggested that ‘state of emergency is the counterpart in international law of self-defence in penal law’.⁵⁶² The view that IHRL’s regimes of limitations and derogations can shed some light on the legitimacy of non-state violence in peacetime is enhanced by the fact that it is increasingly accepted that IHRL is directly binding on entities other than states even in situations falling short of an armed conflict.⁵⁶³ This position is well reflected in the statement by the *Institut de Droit International*: ‘To the extent that certain aspects of internal disturbances and tensions may not be covered by international humanitarian law, individuals remain under the protection of international law guaranteeing fundamental human rights. All parties are bound to respect fundamental rights under the scrutiny of the international community’.⁵⁶⁴ This is particularly imperative with respect to *jus cogens* norms.⁵⁶⁵ Hence, rebellion movements acting in self-defence against an

⁵⁶⁰ David Miller, ‘The Use and Abuse of Political Violence’ (1984) 32 *Pol Stud* 401, 404.

⁵⁶¹ Jan Arno Hessbruegge, *Human Rights and Personal Self-Defence in International Law* (OUP 2017) ch 8.

⁵⁶² International Commission of Jurists, *States of Emergency: Their Impact on Human Rights* (ICJ 1983) 413.

⁵⁶³ See eg Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 534 (‘Once one accepts the proposition that human rights are ultimately concerned with the protection of human dignity and that assaults on that dignity have to be prevented, remedied, and punished, there is little room left for arguments about the state or non-state character of the assailant’); Jean-Marie Henckaerts and Cornelius Wiesener, ‘Human Rights Obligations of Non-State Armed Groups: A Possible Contribution from Customary International Law?’ in Robert Kolb and Gaggioli Gloria (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 153-54, 159-60; Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016) 157-60.

⁵⁶⁴ *Institut de Droit International*, ‘The Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in Which Non-State Entities are Parties’ (Berlin, 25 August 1999) para x <http://www.justitiaetpace.org/idiE/resolutionsE/1999_ber_03_en.PDF> accessed 15 March 2017.

⁵⁶⁵ Committee on Non-State Actors, ‘Non-State Actors in International Law: Aims, Approach and Scope of Project and Legal Issues — First Report’ (International Law Association, Hague 2010) 17, para 3.2 (‘The consensus appears to be that currently NSAs do not incur direct human rights obligations enforceable under international law. Exceptions include violations of *jus cogens* norms, the duty of insurgents to comply with international humanitarian law, and perhaps, “legitimate expectations” of the international community that NSAs comply with certain norms, such as for organised armed groups to refrain from committing human rights abuses’). The ILC has identified the prohibitions of genocide, slavery, racial discrimination, crimes against humanity and torture as examples of ‘clearly accepted and recognised’ peremptory norms of international law. ILC, Draft Articles on Responsibility of States for

oppressive government are legitimate as long as they comply with basic provisions of IHL (obligations of total restraint) and IHRL (proportionality, necessity, respect for non-derogable rights and peremptory norms). Violations of the most fundamental provisions of humanitarian treaty and customary law as well as certain non-derogable human rights can hardly ever be justified by self-defence.⁵⁶⁶

Terrorist violence by definition falls short of meeting the requirement of legitimate means because its underlying objective is to precisely use civilians' suffering as a means to compel certain actors into a course of action they otherwise would not be likely to take. As Michael Walzer has pointedly maintained, '[r]andomness is the crucial feature of terrorist activities'.⁵⁶⁷ Similarly, Schmidt observed that '[i]t is the wanton assault on civilians and non-combatants that provides much of the terror to terrorism'.⁵⁶⁸ In this sense, innocence of the victims of terrorism is not only irrelevant but is even a special incentive for targeting due to the conscience-shocking impact of such extra-normal violence of the terrorist.⁵⁶⁹ However, it can be maintained that revolution does not fare better in this regard, since it implies violence, and all too often indiscriminate violence, which whilst directed against the sitting government and its supporters, quite often occasions innocent deaths and/or bodily injuries. Thus, whether violence is deliberate or unintentional but entirely predictable is of a limited moral significance.⁵⁷⁰ On a more theoretical level, it is untenable to speak about appropriate means to 'wage' revolutions because it is precisely the extra-legal, or more emphatically anti-legal, nature of the phenomenon in question that makes any application of the criterion of legitimate means meaningless.

Yet, it is commonly acknowledged that revolutionary violence can never justify indiscriminate attacks, cruelty and grave human rights violations. It is constrained by fundamental principles of IHL and IHRL, including proportionality, distinction and necessity. Some authors argue that unless revolution reaches the level of an armed conflict when IHL is applicable,

Internationally Wrongful Acts, With Commentaries, 'Report of the International Law Commission on the Work of its 53rd Session' (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10, 85, para 5. The UN Human Rights Committee has asserted, albeit indirectly, that arbitrary deprivations of life, torture and inhuman or degrading treatment, taking of hostages, imposing collective punishments, arbitrary deprivations of liberty and deviating from fundamental principles of fair trial are acts in violation of peremptory norms of international human rights law. UNHRC 'General Comment No 29: Article 4 (States of Emergency)' (2001) UN Doc CCPR/C/21/Rev.1/Add.11, para 11.

⁵⁶⁶ See ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, 'Report of the International Law Commission on the Work of its 53rd Session' (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10, 74.

⁵⁶⁷ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (4th edn, Basic Books 2006) 197.

⁵⁶⁸ Alex P Schmidt, 'The Definition of Terrorism' in Alex P Schmidt (ed), *The Routledge Handbook of Terrorism Research* (Routledge 2011) 68.

⁵⁶⁹ *ibid* 81.

⁵⁷⁰ Virginia Held, 'Legitimate Authority in Non-State Groups Using Violence' (2005) 36 J Soc Phil 175, 180.

collateral civilian casualties are absolutely prohibited.⁵⁷¹ Otherwise such revolutionary acts are indistinguishable from terrorism. From an utilitarian perspective, revolutionaries that are ready to employ terrorism as a means of fighting an oppressive regime are likely to become oppressive themselves once they gain power.⁵⁷² However, maintaining an absolute prohibition on civilian killings in time of revolution is untenable, particularly in light of the fact that many countries with colonial history owe their independence to employing such tactics against a superior military power,⁵⁷³ and should be weighed against other relevant issues including necessity and the 'lesser evil' doctrine. Thus, rebels may assert that the revolutionary use of force is the last resort for them to vindicate their right to freedom and democracy and, hence, killings (including civilian casualties) are not arbitrary but legitimate restriction on the right to life, aimed to attain a more valuable objective. They could similarly perceive themselves in supreme emergency which brings them under the rule of necessity, and necessity knows no rules. However, such arguments are equally applicable to terrorists and are not amenable to objective verification, unless one considers a possibility that revolutionaries do not target civilians intentionally but only incidentally or as collateral damage even if such violence is unjustifiably indiscriminate (the doctrine of double effect),⁵⁷⁴ whereas for terrorists such killings are a deliberate and opportunistic (the use of suffering as a means) fighting strategy. The words of Osama Bin Laden well reflect this subtlety: 'We do not have to differentiate between military or civilian. As far as we are concerned, they [Americans] are all targets'.⁵⁷⁵ However, such evaluations are inherently subjective and inevitably dependant on circumstances, political agendas and idiosyncrasies of the actors who make such judgments. One way to solve this uncertainty would be to acknowledge that sometimes revolutionaries may employ terrorist tactics and yet qualify as revolutionaries. In such case, after the revolution ceases, they may be held responsible solely for their 'terrorist' actions. However, this approach is relevant for allocating responsibilities in the post-revolutionary environment and does not solve the problem of distinction as such. It follows that violence employed in the course of revolution that goes beyond imposing direct harm on (oppressive) government and its agents is barely distinguishable from terrorism, regardless of the legitimate cause. Thus, more criteria are needed to solve the ambiguity between revolutionaries and terrorists.

⁵⁷¹ Nicholas Kittrie, 'Patriots and Terrorists: Reconciling Human Rights with World Order' (1981) 13 Case W Res J Int'l L 291, 304-05; Aleksandr Marsavelski, 'The Crime of Terrorism and the Right of Revolution in International Law' (2013) 28 Conn J Int'l L 241, 282.

⁵⁷² Aleksandr Marsavelski, 'The Crime of Terrorism and the Right of Revolution in International Law' (2013) 28 Conn J Int'l L 241, 283.

⁵⁷³ Erin Creegan, 'A Permanent Hybrid Court for Terrorism' (2011) 26 Am U Int'l L Rev 237, 250.

⁵⁷⁴ Under the doctrine of double effect, it is permissible to take the life of innocent people as long as it was not the goal or intended result.

⁵⁷⁵ Osama bin Laden quoted in National Commission on Terrorist Attacks, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States Including the Executive Summary* (Claitor's Law Books and Publishing 2004) 47.

6.5.3.3. Legitimate Target

A third criterion, namely that of legitimate target, may be helpful in this regard. The most distinctive feature of revolution is that it is effectuated against an oppressive government, whereas terrorism can target both democracies and autocracies. In principle, non-state violence cannot be used in true democratic political systems because elections and other constitutional methods exist to ensure that political decisions are discussed and criticised in a peaceful manner. Thus, any politically motivated violence employed without recourse to peaceful channels available in democracies is roughly speaking illegitimate.

Whilst the legitimate target thesis does not feature explicitly among the core principles of the JWT, its support can be found in the international practice condoning resistance to oppressive authoritarian governments by refusing to extradite political offenders.⁵⁷⁶ The practice emerged in the late eighteenth and early nineteenth centuries with the rise of constitutionalism and democratic governments and entailed granting of immunity to individuals who committed a political offence in an enemy state. Since many (primarily Western) states were formed on ideals of democratic rebellion, they felt uneasy about extraditing individuals fighting for these very values.⁵⁷⁷ Thus, they invented the political offence exception to remove the application of extradition to persons fighting against political injustices. In the nineteenth century, the notion of the political offence exception was refined by redefining the qualifier 'political'. Whilst the precise definition has never been developed, the implicit requirement was that the political offender would be committed to the cause of democracy.⁵⁷⁸ Immediately after the political offence exception was formed it was established that terrorism would not be qualified as such and would constitute exception to the exception.⁵⁷⁹

The idea that certain acts of violence are more legitimate than others in view of their target found its way to a recommendation on terrorism adopted in 2001 by the European Parliament, which states that there is a difference between 'acts whose aim [...] is to alter [...] structures in States governed by the rule of law by actually threatening to use violence or resorting to violence, as distinct from acts of resistance [...] against State structures which themselves employ terrorist methods'.⁵⁸⁰ The recommendation in fact suggests that violence against oppressive, or terrorist, states is more legitimate than

⁵⁷⁶ See generally Vincent DeFabo, 'Terrorist or Revolutionary: The Development of the Political Offender Exception and Its Effects on Defining Terrorism in International Law' (2012) 2 AU Nat'l Sec L Brief 69.

⁵⁷⁷ *ibid* 70.

⁵⁷⁸ See Christine Van den Wijngaert, *The Political Offense Exception to Extradition: The Delicate Problem of Balancing the Rights of the Individual and the International Public Order* (Kluwer 1980) 18.

⁵⁷⁹ This became to be known as the *attentat clause* which stated that attempts on the life of the head of state, war crimes, genocide and act of terrorism were not sufficiently political as to refuse extradition. See *ibid* 14-15.

⁵⁸⁰ European Parliament recommendation (EP) A5-0273/2001 of 5 September 2001 on terrorism (2001/2016(INI)) [2002] OJ C72 E/135, 139, para T.

against those governed by the rule of law, or liberal democracies. The (positive) international responses to the so-called ‘democratic military coups’ — ‘benign’ *coups d’état* whose goal is to oust nondemocratic regimes and to bring about free and fair elections — in Turkey, Portugal, Algeria and more recently in Egypt also reflect this trend.⁵⁸¹ In other words, international attitudes with respect to violence are inextricably linked with attitudes towards regimes against which the violence is employed.

The term ‘terrorist state’ is relevant as far as non-state political violence that is directed against it cannot in principal be regarded as terrorism, provided that other conditions are met. However, the applicability of the term ‘terrorism’ to the actions of governments or states is a matter of contention and constitutes one of the major bones of uncertainty regarding the definition of terrorism. Yet, academic comments provide some useful guidelines. Schmidt describes terrorist state as ‘a form of rule by fear [...] when a repressive and illegitimate political regime wants to enforce conformity, obedience and non-resistance through extra-legal terror’.⁵⁸² Falk has observed in the context of the Palestinian-Israeli conflict that ‘[c]ollective punishment of a people subject to the exigencies of a military occupation with territorial ambitions is clearly as much a form of terrorism as reliance on suicide bombers to explode deadly ordinance in places where innocent civilians abound’.⁵⁸³ Primoratz adds that terrorist state is a state which employs terrorism in a *sustained* and *systematic* manner against its own population. Thus, degree of involvement in terrorism is crucial for designating state as terrorist.⁵⁸⁴ Indeed, the word ‘terrorism’ was originally used to designate the ‘Reign of Terror’ established by the Jacobin regime during the French revolution, that is to a particular case of state terrorism, and, thus, to claim that terrorism is only applicable to non-state actors is to demonstrate poor analysis. On top of that, it is crucial to note that democracies too have engaged in terrorism: consider, e.g., the cases of ‘terror bombing’ of Dresden and Hamburg, Hiroshima and Nagasaki where direct victims were deliberately civilians.⁵⁸⁵

However, it is not enough to show that the state against which violence is employed may itself commit acts which amount to terrorism. As the saying goes, two wrongs do not make a right. Moreover, the practical usefulness of the criterion of legitimate target is complicated by the fact that there is no universally agreed definition of democracy. To complicate things even further, the emergence of hybrid regimes, manifesting institutional democratic

⁵⁸¹ See eg Gregory H Fox and George Nolte, ‘Intolerant Democracies’ in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000); Ozan O Varol, ‘The Democratic Coup d’État’ (2012) 53 Harv Int’l LJ 291.

⁵⁸² Alex P Schmidt, ‘The Definition of Terrorism’ in Alex P Schmidt (ed), *The Routledge Handbook of Terrorism Research* (Routledge 2011) 77.

⁵⁸³ Richard Falk, ‘Azmi Bishara, the Right of Resistance, and the Palestinian Ordeal’ (2002) 31 J Palest Stud 19, 21.

⁵⁸⁴ Igor Primoratz, ‘State Terrorism and Counter-Terrorism’ in Igor Primoratz (ed), *Terrorism: The Philosophical Issues* (Palgrave Macmillan 2004) 115.

⁵⁸⁵ Igor Primoratz, ‘What is Terrorism?’ in Igor Primoratz (ed), *Terrorism: The Philosophical Issues* (Palgrave Macmillan 2004) 22-23.

features, such as elections, but failing on more substantive characteristics, including genuine political participation and accountability, means that it is all too often close to impossible to identify the legitimate target and thus decide on whether non-state violence is justified or can be considered as terroristic. Consider, for example, a situation when a democratically elected government has become oppressive over the course of its mandate and the period until the next elections take place is too long to wait, not to mention the situations when the government in question abuses its constitutional powers to delay such elections. Should such government be considered as autocratic and violence against it justified? If so, when does such transition occur and who is to decide that it occurred and on the basis of what criteria? To make things worse, from a utilitarian perspective, it is morally legitimate to take violent action against a liberal democracy when such violence can ‘reasonably be expected to relieve a much greater quantity of harm and suffering than it causes’.⁵⁸⁶ Consequently, more indications are wanting in order to construct a working framework for ‘illegal but justifiable’ revolution.

Legitimate target can also be understood in terms of persons. Whereas terrorism primarily entails intentional targeting of civilians to produce shock and awe, freedom fighters only attack combatants. As Ganor asserted, ‘[t]he most important factor of the definition of terrorism [...] is [...] the deliberate attack aimed against civilians’.⁵⁸⁷ On his account, ‘[t]errorism exploits the relative vulnerability of the civilian “underbelly” — the tremendous anxiety, and the intense media reaction evoked by attacks against civilian targets’.⁵⁸⁸ Similarly, Netanyahu insisted that ‘[t]errorism is the deliberate and systematic assault on civilians’.⁵⁸⁹ National liberation and resistance to occupation entails instead targeting personnel or infrastructure that is directly responsible for the maintaining political oppression or occupation or provides the repressive regime or occupiers direct material support and political legitimacy. Thus, whilst the goals of terrorists and freedom fighters may well be identical, they are distinguished from each other by the targets of their operations. As one scholar has observed, ‘[t]here is no merit or exoneration in fighting for the

⁵⁸⁶ David Miller, ‘The Use and Abuse of Political Violence’ (1984) 32 *Pol Stud* 401, 417. See also Paul Wilkinson, *Terrorism and the Liberal State* (Macmillan 1977) 40 (Arguing that only in ‘very extreme and rare cases’ when, inter alia, basic rights and liberties of minorities ‘are denied or taken away by arbitrary action of the government or its agents’ or when states fail to take appropriate action to protect can violence be used against liberal state). However, it is doubtful whether states inflicting harm on their citizens and failing to discharge their protective responsibilities with respect to minorities can be qualified as liberal.

⁵⁸⁷ Boaz Ganor cited in Alex P Schmidt, ‘The Definition of Terrorism’ in Alex P Schmidt (ed), *The Routledge Handbook of Terrorism Research* (Routledge 2011) 67.

⁵⁸⁸ Boaz Ganor, ‘Defining Terrorism: Is One Man’s Terrorist Another Man’s Freedom Fighter?’ (2002) 3 *PPR* 287, 294-95.

⁵⁸⁹ Benjamin Netanyahu, *Fighting Terrorism: How Democracies Can Defeat Domestic and International Terrorists* (2nd edn, Farrar, Straus and Giroux 2001) 8.

freedom of one population if in doing so you destroy the rights of another population'.⁵⁹⁰

There is an important nexus between these two types of target: whilst civilians are direct victims of terrorist violence, governments are the ultimate targets. As Schmidt put it, 'most victims of terrorism, while chosen as representative or symbolic targets of direct violence, are only secondary targets, mere props for the staging of a violent spectacle meant to influence the perception and behaviour of one or several other audiences — the ultimate targets in the macabre spectacle of terror'.⁵⁹¹ Such differentiation between direct and ultimate targets lies at the very core of terrorism, as opposed to revolutionary violence.

6.5.3.4. Legitimate Conditions

Legitimate end, means and target fail to capture the entire spectrum of what might justify non-state use of force in international law. What still needs to be addressed is a certain nexus between these three elements. To this end, Frederic Megret suggested a so-called 'legitimate conditions' requirement to serve as a sort of glue between the three principal legitimacy criteria. These conditions include subsidiarity, proportionality, legitimate authority (representativity) and reasonable prospect of success.⁵⁹² Noteworthy, the Canadian Commission on Intervention and State Sovereignty in its report on the responsibility to protect identified similar principles as 'precautionary criteria' for legitimate use of force. These include, *inter alia*, last resort, proportional means, right authority and reasonable prospect.⁵⁹³ Because proportionality is one of the essential elements of legitimate means, only three remaining conditions will be considered here.

Subsidiarity implies that violence is legitimate if applied as last resort and all peaceful means to resolve the issue, including administrative, judicial and constitutional, have been exhausted. The preambular provision of the UDHR, that 'it is essential if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should

⁵⁹⁰ Boaz Ganor, 'Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?' (2002) 3 PPR 287, 288.

⁵⁹¹ Alex P Schmidt, 'The Definition of Terrorism' in Alex P Schmidt (ed), *The Routledge Handbook of Terrorism Research* (Routledge 2011) 80.

⁵⁹² Frederic Megret, 'Beyond "Freedom Fighters" and "Terrorists": When, if Ever, is Non-State Violence Legitimate in International Law' (6 April 2009) 20 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1373590> accessed 20 October 2016. See also Aleksandr Marsavelski, 'The Crime of Terrorism and the Right of Revolution in International Law' (2013) 28 Conn J Int'l L 241, 278-85 (Suggesting four principles guiding the legitimate use of force, or as the author put it 'the use of force in furtherance of revolution': (1) principle of democracy, (2) principle of proportionality, (3) principle of just cause, and (4) principle of distinction).

⁵⁹³ ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Center 2001) 32ff.

be protected by the rule of law',⁵⁹⁴ suggests such a last-resort and remedial nature of permissible violence. The condition of last resort is also widely accepted within the international scholarly community. As Macfarlane has observed, if a state 'refuses to permit constitutional methods of protest and uses brute force, intimidation, and bloodshed to break up peaceful acts of non-violent protest', then 'a prima facie case for the use of violence in support of a substantiated rejection of political obligation can be made'.⁵⁹⁵ Similarly, Honore claimed that '[t]he right of rebellion should be conditioned on the exhaustion of nonviolent remedies'.⁵⁹⁶ More emphatically, Lackey insisted that '[i]f the just cause might be achieved by other means that have not been attempted, then war for that just cause is not just war'.⁵⁹⁷

Thus, a revolutionary movement must show that it has made every effort to pursue nonviolent options before resorting to armed force, which may include political negotiations, appeals to human rights mechanisms, civil disobedience, pleas to the international community etc. Only if these peaceful options failed, especially if they were brutally repressed, may violent campaign be considered. Terrorism does not meet this condition because, as a rule, it is not occasioned by political failure but is an informed and conscientious choice made by individuals and/or groups without even considering other options. As Fotion has submitted, terrorism does not meet the criterion of subsidiarity 'because it is very difficult to show convincingly that there is no other less painful way to get the revolutionary job done'.⁵⁹⁸ If it does meet the criterion then its terrorist nature should be reconsidered. For example, it has been said with respect to so-called 'terrorist' tactics by the African National Congress (ANC) in South Africa that: 'The armed actions of the long-suffering victims came after a long search for political solutions, which were entirely foreclosed by the apartheid system. The ANC adopted violent means only after 48 years of fruitless negotiations with various South African governments'.⁵⁹⁹ Similarly the Terrorist Fraction of the 'Narodnaya Volya' resorted to 'terror' as 'the only possible weapon available to it in the circumstances of Russia's autocratic tyranny' because it 'robbed them of "any possibility of exerting an influence peacefully and in a cultured manner on the life of society"'.⁶⁰⁰ Thus, albeit the two cases of resort to violence were dubbed as terrorist, they in fact exhibit

⁵⁹⁴ Universal Declaration of Human Rights, UNGA Res 217(III)A (10 December 1948) preamble.

⁵⁹⁵ Leslie J Macfarlane, 'Justifying Political Disobedience' (1968) 79 *Ethics* 24, 47.

⁵⁹⁶ Tony Honore, 'Right to Rebel' (1988) 8 *Oxford J Leg Stud* 34, 46.

⁵⁹⁷ Douglas P Lackey, *The Ethics of War and Peace* (Prentice-Hall 1989) 40.

⁵⁹⁸ Nick Fotion, 'The Burdens of Terrorism' in Igor Primoratz (ed), *Terrorism: The Philosophical Issues* (Palgrave Macmillan 2004) 49.

⁵⁹⁹ Edward S Herman and Gerry O'Sullivan, *The Terrorism Industry: The Experts and Institutions that Shape Our View of Terror* (Pantheon Books 1989) cited in Frederic Megret, 'Beyond "Freedom Fighters" and "Terrorists": When, if Ever, is Non-State Violence Legitimate in International Law' (6 April 2009) 21 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1373590> accessed 20 October 2016.

⁶⁰⁰ David C Rapport and Yonah Alexander, *The Morality of Terrorism: Religious and Secular Justifications* (Pergamon 2015) 235.

legitimacy by meeting the condition of subsidiarity. Whilst it is true that the mere absence of other ways of attaining a certain goal cannot automatically render violence legitimate, it definitely makes such violence more legitimate than the one committed without any attempt to seek peaceful channels.

Needless to say, ascertaining whether freedom fighters engaged in violent struggle actually met the condition of subsidiarity is not an easy task and should be weighed against an empirically-based evidence that undemocratic regimes can be more successfully challenged using non-violent resistance.⁶⁰¹ Nonviolent resistance is more effective because it sets lower physical, moral and informational barriers for participation, which, in turn, ensures mass involvement on a scale that violent campaigns cannot. Moreover, nonviolent resistance is more likely to gather international support.⁶⁰² Violent armed resistance, on the other hand, occasions disruption and havoc, which compromises considerably the successful achievement of the political goal sought. Thus, it seems plausible to suggest that this criterion is extremely challenging to meet, if at all, and thus no violence can be justified on its basis. On the other hand, if the governing regime seeks to suppress pro-democracy movement by way of mass atrocities, nonviolent campaign becomes meaningless since it is not the undemocratic nature of the regime as such which is challenged but its criminal policy of unjustified repression and murder.

A second crucial condition for distinguishing between terrorism and revolution is that of legitimate authority. In order for non-state groups to be acknowledged as pursuing legitimate cause, which is a goal to achieve certain public good, such as democracy and human rights, they have to show that they represent the aspirations of the majority of population. In words of Paust, 'the right of revolution is in the nation as a whole and is not a right of some minority of an identifiable people'.⁶⁰³ Thus, representativeness yields legitimacy to authority claiming to act on behalf of people. However, in the contemporary legal doctrine legitimate authority is understood to lie solely with states, which means that only states can legitimately engage in conflict. Such state's monopoly on violence is considered necessary to maintain global peace and order. However, it is widely accepted that many authoritarian states do not represent interests of their people and cannot, thus, claim legitimacy.⁶⁰⁴ It follows that if legitimacy can be denied to some states, it is logical to assume that legitimacy of some non-state actors can be upheld. As Thomson has astutely pointed out: '[I]f a revolutionary organization fighting against a

⁶⁰¹ Erica Chenoweth and Maria J Stephan, *Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict* (Columbia UP 2011) 7, 9 (Claiming that nonviolent campaigns are twice as likely as the violent ones to attain their political objectives).

⁶⁰² *ibid* 220-21.

⁶⁰³ Jordan J Paust, 'The Human Right to Participate in Armed Revolution and Related Forms of Social Violence: Testing the Limits of Permissibility' (1983) 32 *Emory LJ* 545, 553.

⁶⁰⁴ See eg Brad Roth, *Governmental Illegitimacy in International Law* (OUP 1999) 15; Steven Wheatly, *The Democratic Legitimacy of International Law* (Hart Publishing 2010) 211 ('Authoritarian regimes that exclude the population from any effective role in government, maintaining control only through coercive measures, are, like the coelacanth, remnants of a bygone era').

tyrannical government manages to command the support of most of the people, it has a far better claim to be a legitimate authority than does their state'.⁶⁰⁵ The pertinence of this claim is also evidenced by the international recognition of rebel governments in Syria and Libya as the legitimate representatives of their peoples, not to mention the PLO in Palestine, which was granted observer status by the UN in 1975. In addition, the very idea of the right to self-determination is based on an assumption that it can be carried out by non-state entities. Because revolution represents the extreme form of internal self-determination, people engaging in revolution can claim legitimate authority provided that they act against illegitimate government and represent the interests of the majority of the population. *Ergo*, legitimate authority should be understood not as an abstract quality appertaining solely to states in view of their special moral standing as guardians of peace, order and human rights but as a representativity, that is whether the body fighting the war is authorised to do so by the polity it represents.⁶⁰⁶ In fact, the common point on which most terrorist movements fail is that they claim to speak in the name of populations that have never granted them a mandate. 'This makes many terrorist groups little more than totalitarian boutiques, catering to their own fanaticism rather than popular grievances'.⁶⁰⁷

However, it is possible to envisage situations when popular resistance does not necessarily enjoy the majority support because people are unaware of the need of revolution due to the deceptive official propaganda and are, thus, unable to make an informed choice or they may be unable to manifest their support due to severe political oppression. In such cases it would be enough for a resistance movement to show that they are acting in true interests of the people and they reasonably believe that the majority of citizens would support the revolutionary violence if they were aware of the relevant circumstances or had possibility to express their approval.⁶⁰⁸ Ultimately, representativeness implies certain internal democratic organisation within an entity claiming legitimate authority, such as possibility of minimal participation and deliberation. It is too a point on which most terrorist movements fail since their

⁶⁰⁵ Janna Thomson, 'Terrorism and the Right to Wage War' in CAJ Coady and Michael P O'Keefe (eds), *Terrorism and Justice: Moral Argument in a Threatened World* (Melbourne UP 2002) 155.

⁶⁰⁶ See particularly Seth Lazar, 'Authorization and the Morality of War' (2016) 94 Aust J Phil 211.

⁶⁰⁷ Frederic Megret, 'Beyond "Freedom Fighters" and "Terrorists": When, if Ever, is Non-State Violence Legitimate in International Law' (6 April 2009) 24 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1373590> accessed 20 October 2016.

⁶⁰⁸ See Christopher J Finlay, 'Legitimacy and Non-State Political Violence' (2010) 18 J Pol Phil 287, 310; Aleksandr Marsavelski, 'The Crime of Terrorism and the Right of Revolution in International Law' (2013) 28 Conn J Int'l L 241, 280; Anne Schwenkenbecher, 'Rethinking Legitimate Authority' in Fritz Allhoff, Nicholas G Evans and Adam Henschke (eds), *Routledge Handbook of Ethics and War: Just War Theory in the Twenty-First Century* (Routledge 2013) 164.

external violence is replicated in their internal structure, which is often 'tyrannical, if not cultish'.⁶⁰⁹

The last condition which should be present for a revolutionary movement to claim legitimacy and, hence, detach itself from terrorism is arguably reasonable prospect of success. The idea is widely cited with respect to legitimacy of non-state use of force and implies that violence which exemplifies a poor political judgment and does not envisage even a minuscule plausibility of success is normatively unjustifiable since it will cause more harm than good it claims to achieve.⁶¹⁰ It is, nonetheless, rather doubtful whether the requirement of reasonable prospect of success can serve as an effective criterion of legitimacy of political violence. Applied to terrorist violence, it is widely acknowledged that terrorism is in general politically ineffective, entails futile acts of mass violence and has hardly ever achieved national liberation⁶¹¹ and, hence, falls foul of this criterion. However, it can fairly be asserted that achieving even a partial goal (attacking international attention or gaining political concessions from their adversaries), what terrorists have more often succeeded in, may be enough to justify political violence. Similar considerations are also applicable to revolution. As Kaufmann observed, 'resistance which appears at the outset completely hopeless and therefore meaningless is not legitimate'.⁶¹² Similarly, Orford speculated that the only legitimate rebellion is a successful one.⁶¹³ To accept the idea that the legitimacy of revolution is tied to its success is to essentially altogether deny that there is a right to revolution, since on this view revolution is only permissible unless the oppressive government has institutionalised its dictatorship to such an extent that any prospect of success is close to non-existent. However, if such dictatorship is not absolute and leaves certain legal space for peaceful resistance then such avenues should be utilised first and revolutionary forces would fall foul of the consideration of subsidiarity.⁶¹⁴ This would lead to an unfortunate conclusion that any violence that is 'hopeless' can be designated as unjustifiable. Not only does this condition set too low a threshold for qualifying violence as illegitimate but it also insights *greater* violence: force should be either overwhelming to secure the legitimate aims or should be avoided entirely. Another problem with the requirement of reasonable prospect of success is its *post-facto* application, namely the

⁶⁰⁹ Frederic Megret, 'Beyond "Freedom Fighters" and "Terrorists": When, if Ever, is Non-State Violence Legitimate in International Law' (6 April 2009) 25 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1373590> accessed 20 October 2016.

⁶¹⁰ See eg Nick Fotion and Bruno Coppieters, 'Likelihood of Success' in Bruno Coppieters and Nick Fotion (eds), *Moral Constraints of War: Principles and Cases* (MD: Lexington 2002) 79; Daniel Statman, 'On the Success Condition for Legitimate Self-Defence' (2008) 118 *Ethics* 659.

⁶¹¹ Laurence Freedman, *War* (OUP 1994) 330; Orend Brian, 'War', *The Stanford Encyclopaedia of Philosophy* (Winter edn, 2005) <<http://plato.stanford.edu/archives/win2005/entries/war/>> accessed 26 October 2016; Michael Walzer, *Arguing About War* (Yale UP 2005) 56.

⁶¹² Arthur Kaufmann, 'A Small Scale Right to Resist' (1986) 21 *New Eng L Rev* 571, 575.

⁶¹³ Anne Orford, 'The Destiny of International Law' (2004) 17 *LJIL* 441, 459.

⁶¹⁴ This was actually recognized by Kaufmann himself. Arthur Kaufmann, 'A Small Scale Right to Resist' (1986) 21 *New Eng L Rev* 571, 576.

legitimacy of revolution can only be assessed afterwards, leaving the ongoing revolutionary violence in a sort of legal limbo. Moreover, the evaluation of the outcome of the revolution does not occur immediately after it ceases but may take years, even decades, considering also the fact that certain legal and political reforms need not only changes in legislation but also in mentality and culture to be fully implemented. As Marsavelski eloquently stated, if state is compared to a living organism, ‘revolutions are like medical surgeries and so is their outcome: usually, it is going to get worse before it gets better. If the condition does not improve, the physician is not automatically responsible for medical malpractice if he acted in accordance with the medical rules’.⁶¹⁵ It follows that the criterion of reasonable success is of no practical significance for the task of sketching a framework of justifiable revolution.

6.5.4. Conclusion

It has been established that the notion of ‘illegal but justifiable’ revolution is based on the second-tier framework of ethical principles rooted in the JWT, which include legitimate cause, legitimate means, legitimate target and a set of legitimate conditions, such as subsidiarity, legitimate authority and reasonable prospect of success. The phenomenon of terrorism as the most prominent and deeply studied example of illegitimate political non-state violence has been used as an opposing premise against which the framework for justifiable use of force could be comprehensively defended. The relevance of the JWT for clarifying the content and *modus operandi* of the concept of ‘illegal but justifiable’ revolution has been affirmed on three grounds. First, the ethical framework of the just war tradition, albeit not constituting the positive layer of norms of international law on the whole (only certain just war principles have been codified into treaty law or acquired a status of customary law and only in limited context, such as in the law of the use of inter-state force and IHL), is acknowledged to exert a strong intellectual and moral influence within any debate on legitimacy of political violence. Its reinvigoration is triggered by the increasing invocation of the substantive legitimacy rationale in international relations in order to account for situations where the divide between what law requires and what morality ordains is insurmountable and where maintaining the prohibition on violence is as important as permitting justice in individual cases. It is further asserted that international practice as well as scholarly opinions exhibit strong signs of endorsement of the just war framework for ‘illegal but justifiable’ use of force. Second, it is demonstrated that the JWT’s core principles are applicable to non-state actors, such as revolutionaries, because the just war tradition historically predates states, because international law increasingly vests non-state actors with rights and obligations appertaining to the use of force and because such applicability does not contradict the

⁶¹⁵ Aleksandr Marsavelski, ‘The Crime of Terrorism and the Right of Revolution in International Law’ (2013) 28 Conn J Int’l L 241, 284.

doctrine of statehood, since modern conceptualisation of state as *Rechtsstaat* implies that state retains its monopoly on the use of force as long as it is capable of guaranteeing its subjects fundamental rights and freedoms. Ultimately, just war principles were shown to be applicable to political violence not attaining the level of an armed conflict on either factual or legal grounds due to the fact that the changing nature of the conflict waters down the notion of combatancy.

It is concluded that revolution is ‘illegal but justifiable’ when it is staged in response to gross and sustainable human rights violations, including the violation of the right to democracy, is undertaken in adherence to the relevant norms of international law, such as IHL and IHRL, targets persons and property representing and/or supporting oppressive regime, is carried out as a measure of last resort and represents aspirations of the majority of population. This is not, however, to say that the application of these second-order ethical principles now fully resolves the unusual *sui generis* status of the right to revolution and modalities of its exercise. These principles are rather general and, hence, incapable of capturing all the particularities and local specificities of peoples’ struggles for freedom, which sometimes leads to the blurring of conceptual boundaries between legitimate and illegitimate political violence. The case of Nelson Mandela’s ANC, where revolutionary violence incorporated terrorist tactics but was eventually recognised as legitimate by the international community, is but one prominent example.⁶¹⁶

All in all, albeit the second-tier framework for ‘illegal but justifiable’ revolution based on the JWT might appear as lacking sufficient clarity and legal robustness by virtue of being too abstract and normative (prescriptive) to serve as a clear guide for action, it introduces additional avenues for debate over controversial conduct and provides a setting of more controlled criteria for the interpretation of first-tier legal rules with a view of adapting those to changing circumstances. Its virtue of providing a flexible alternative to context-isolated binary assessments having no options other than ‘legal’ or ‘illegal’ outweighs on balance the costs. To affirm exceptional legitimacy of political violence in furtherance of revolution is not only to generally recognise that the very existence of human rights plainly depends on the possibility of (violent) resistance in cases of their sustained and mass violations but also to accept the specific claim of this thesis, namely that revolution is an ultimate measure of democracy defence, constituting an essential element of the enforcement dimension of the democratic entitlement.

⁶¹⁶ For an insightful discussion as to the scepticism with regard to the possibility to distinguish terrorists from freedom fighters, see Alex P Schmid, ‘Introduction’ in Alex P Schmidt (ed), *The Routledge Handbook of Terrorism Research* (Routledge 2011) 20, 68 (Claiming for instance that ‘[t]he dilemma of “terrorists or freedom fighters” has been misleading, at best, from the very beginning and best reflects the highly politicised nature of all discussions on terrorism. There are no terrorist goals; there are terrorist means. Attempts to define these groups as either purely insurgent (“freedom fighters”) or purely terrorist are misleading, as these groups are both insurgent and terrorist at the same time. Thus, the dilemma ‘terrorists versus freedom fighters’ does not make any sense and should not be applied to insurgent movements that combine terrorist tactics with other means [...]).

In order to test this hitherto rather theoretical suggestion, it is imperative to have a look at state practice in response to the twenty-first-century major democratically inspired upheavals, which have exerted a significant impact not only on the international political layout and modalities of inter-state interactions but also on the international legal theory, touching upon such fundamental issues as state legitimacy, recognition of states and governments and the doctrine of effectiveness. This suggests that the concept of revolution is gradually affirming its position in international law but in a rather peculiar fashion. The following sections analyse these issues in more details.

6.6. The 21-Century Revolutions as an Evidence of the Acceptance of the Right to Revolution

It has been established that the right to revolution has come to enrich the normative corpus of international law. However, the bizarre *sui generis* status of revolution, albeit somewhat clarified by the reference to the legitimacy rationale, is still largely an academic artefact lacking solid evidence of state practice. This state of affairs is about to change or, to put more precisely, is already undergoing a fine change. Particularly after the revolutions in North Africa and the Middle East in 2010-12 and in Ukraine in 2013-14, the responses of the international community have ardently shaken the classical view of revolutions as a *fait accompli*, considered to be beyond the bounds of the law. Not only have revolutions been recognised as giving rise to full-grown legal consequences, such as non-recognition of governments and state leaders against which revolutions were directed, but also as a measure for achieving legitimate aspirations of people, one of which is democracy. In this sense, revolutions have been endorsed as tools of democracy promotion and democracy defence. Overview and analysis of state practice with respect to the afore-mentioned democratic revolutions can aid in ascertaining whether there is now a customary norm of defending democracy by revolutionary means. To identify such customary norm is to provide an important empirical evidence of the enforcement dimension of the democratic entitlement thesis developed in this work.

6.6.1. The Arab Spring

The ‘Arab Spring’, also known as ‘Arab Awakening’ and ‘Arab Uprisings’,⁶¹⁷ is a socio-political phenomenon that took place in North Africa in late 2010 with the aftershocks still felt in Syria. The Tunisian street vendor’s self-

⁶¹⁷ The term ‘Arab Spring’ is preferred because it is succinct, widely understood and aptly describes the principal features of the events in question, particularly considering the fact that spring in many Arab countries was followed by fall.

immolation in protest of police corruption and abuse of power sparked protests in Tunisia on 18 December 2010, which brought down the Tunisian government. The success of the Tunisian upheaval led to a wave of similar protests and demonstrations in Algeria, Jordan, Egypt, Yemen, Bahrain and Libya, developed into a civil war in Syria and shook Saudi Arabia, Oman, Kuwait and Lebanon. By the end of February 2012, regimes had been forced from power in Tunisia, Egypt, Libya and Yemen whilst civil uprisings and military repression are still ongoing in Syria.⁶¹⁸

Since the collapse of the communism in the early 1990s, the political earthquake generated by Arab uprisings is of such a magnitude that it is viewed as ‘the world’s first true human rights revolution’.⁶¹⁹ It involved over seventeen Muslim countries in North Africa and the Middle East, with an overall population of over 300 million people. Whilst it is not an easy task to delineate a common thread behind the Arab events due to the varying local trajectories, one can nonetheless identify following factors that triggered the protests: authoritarian regimes, lack of transparency and representation, corruption, nepotism and cronyism.⁶²⁰ As one scholar suggested, Arab uprisings were a ‘culmination of a century of Arab popular struggle for freedom and sovereignty’.⁶²¹ Revolting citizens spoke the language of human rights and democracy in their struggle against internal aggression of their autocratic governments. Thus, the lack of democracy was one of the primary triggers of the revolutions throughout the Arab world.

Faced with these pro-democratic revolutions, the responses of the international community ranged from a total inaction in certain cases like Yemen and Bahrain, limited response in Tunisia, Egypt and Syria to the military intervention in Libya. This work will restrict itself to examining the cases of Tunisia, Egypt, Libya and Syria because these are the cases where the most extensive international action was taken in support of the people exercising their right to revolution.

6.6.1.1. Tunisia

In the Arab Spring, the popular uprising in Tunisia is ‘case zero’.⁶²² The country-wide protests that commenced in late 2010 forced Tunisia’s dictator of 23 years, President Zine al-Abidine Ben Ali, to surrender power and leave the country. Facing the growing magnitude of the uprisings and the President’s

⁶¹⁸ See eg Carlo Panara and Gary Wilson (eds), *The Arab Spring: New Patterns for Democracy and International Law* (Martinus Nijhoff 2013) ix.

⁶¹⁹ Rosa Brooks, ‘Lessons for International Law from the Arab Spring’ (2013) 28 *Am U Int’l L Rev* 713, 714.

⁶²⁰ For a comprehensive overview of the major causes of the Arab Spring, including the historical context, see Cherif Bassiouni, ‘The Anatomy of the Arab Spring’ in Rainer Grote and Tilmann J Röder (eds), *Constitutionalism, Human Rights, and Islam after the Arab Spring* (OUP 2016) 404ff.

⁶²¹ Rami G Khouri, ‘The Long Revolt’ (2011) 35 *Wilson Quarterly* 43, 43.

⁶²² Peter J Schraeder, ‘Ben Ali’s Fall’ (2011) 22 *Journal of Democracy* 5, 5.

eventual call for repressive measures, senior military officers refused to obey Ben Ali's order to turn their guns on protesters and decided that he would have to leave. He eventually boarded a plane heading to Saudi Arabia.

Ben Ali was only the second president of Tunisia after it gained independence from France in 1956. He acquired his office by means of a 1987 constitutional coup against Habib Bourguiba, the first president of Tunisia. Whilst he claimed to assume the role of liberaliser and facilitator of Tunisia's democratic transition, he in actual fact installed a full-fledged autocratic regime characterised by a neopatrimonial form of governance.⁶²³

The 2010 uprising was sparked by a 26-year old fruit vendor, Mohamed Bouazizi, setting himself on fire in central Tunisian town of Sidi Bouzid on 17 December 2010 as sign of protest against local police ill-treatment. This tiny act of despair unleashed a powerful wave of popular protests in Sidi Bouzid calling for socio-economic and political reforms. When the social unrest reached the country-wide dimensions, protesters demanded the ouster of Ben Ali and instalment of more representative governmental institutions. The turning point occurred when protesters filled the street of the Tunisian capital, Tunis. Confronted with the largest demonstration in the history of Tunisia, Ben Ali finally fled the country. The demonstrations ended on 27 February 2011 when the key figures of the Ben Ali regime resigned their posts. On 23 October 2011, Tunisians voted for the members to a Constituent Assembly charged with rewriting of Tunisian Constitution. On 22 December 2014, Mohamed Beji Caid Essebsi was elected as Tunisia's president in the country's first free and direct presidential elections.⁶²⁴

The international reactions to the Tunisian revolution, albeit belated, were generally supportive of the Tunisian people's right to express their views by means of protest. For instance, the UN Secretary-General expressed concern about violence against peaceful protesters and supported the establishment of an inclusive interim government.⁶²⁵ Moreover, he confirmed 'the commitment of the United Nations to stand with the people of Tunisia [...] and work to preserve the gains of the revolution'.⁶²⁶ Likewise, the head of the Arab League, Amr Moussa, claimed that '[t]he Arab citizen entered an unprecedented state of anger and frustration'. He called for an Arab 'renaissance' to alleviate this frustration.⁶²⁷ The EU and US echoed this position. Catherine Ashton, the EU

⁶²³ *ibid* 5-6.

⁶²⁴ Patrick Markey and Tarek Amara, 'Veteran Essebsi Wins Tunisia's First Free Presidential Vote' *Reuters* (22 December 2014) <<http://www.reuters.com/article/us-tunisia-election-idUSKBN0JZ04F20141222>> accessed 4 August 2017.

⁶²⁵ 'Statement Attributable to the Spokesperson for the Secretary-General on Tunisia' (New York, 18 January 2011) <<http://www.un.org/sg/STATEMENTS/index.asp?nid=5039>> accessed 29 July 2016.

⁶²⁶ 'Statement Attributable to the Spokesperson for the Secretary-General on the Attacks in Ben Guerdane, Tunisia' (New York, 7 March 2016) <<http://www.un.org/sg/statements/index.asp?nid=9513>> accessed 29 July 2016.

⁶²⁷ 'Arab Leaders Warned of "Revolution"' *Aljazeera* (19 January 2011) <<http://www.aljazeera.com/news/middleeast/2011/01/2011119165427303423.html>> accessed 7 July 2016.

chief diplomat, and Stefan Fule, the enlargement commissioner, said in a joint statement: 'We want to express our support and recognition to the Tunisian people and their democratic aspirations, which should be achieved in a peaceful way'. They also expressed their engagement with Tunisian people and willingness to help find democratic solutions to the crisis.⁶²⁸ In January 2011, the European External Action Service (EEAS) deployed a senior officials' mission to Tunisia in order to provide 'political, legal, technical and material support to the democratic transition' in the country.⁶²⁹ On top of that, the EU instituted sanctions against Ben Ali's regime for the misappropriation of Tunisian state funds.⁶³⁰ By the same token, the US Assistant Secretary Jeffrey Feltman expressed the USA's support for 'Tunisia's democratic transition' and the commitment to aid Tunisia to chart a course 'toward greater political and social freedoms' and to achieve 'transparent, credible and timely elections'.⁶³¹ Similar notes of support were individually given by such states as France, United Kingdom, Switzerland, Germany, Qatar, Morocco, Philippines, Bahrain, Jordan, Qatar, Egypt and Sudan.⁶³²

6.6.1.2. Egypt

Revolutionary spirit of Tunisian uprisings was rapidly picked by Egyptian people unsatisfied with police brutality, state-of-emergency laws, lack of free elections and freedom of speech, corruption, rising inequality and poverty. Anti-government protests in Egypt began on 25 January 2011 and consisted of demonstrations, marches, riots, non-violent civil disobedience and strikes. Regardless numerous attempts of the Mubarak's regime to halt the protests by eliminating the national internet access and employing security forces, the number of protestors continued to increase and in three days it attained over tens of thousands demonstrating in Egypt's major cities, with the number rapidly rising to hundreds of thousands (many claimed that the toll reached 400,000).⁶³³ Whilst the protests began as largely non-violent, this came to change in response to circumstances. The documented cases of violence included burning down the ruling party's headquarters, throwing stones to the

⁶²⁸ European Union, 'Joint Statement by EU High Representative Catherine Ashton and Commissioner Stefan Fule on the Events on Tunisia' (Brussels, 14 January 2011) A 016/11.

⁶²⁹ European Union, 'EEAS Senior Officials' Mission to Tunisia' (Brussels, 26 January 2011) A 029/11.

⁶³⁰ Council Regulation (EU) 101/2011 of 4 February 2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Tunisia [2011] OJ L31/1.

⁶³¹ Media Note 'Assistant Secretary Feltman's Visit to Tunisia' *US Department of State* (Washington DC, 24 January 2011) <<http://www.state.gov/r/pa/prs/ps/2011/01/155243.htm>> accessed 29 July 2016.

⁶³² 'Arabs Offer Cautious Reactions to Ben Ali's Ouster' *Ma'an News Agency* (16 January 2011) <<http://www.maannnews.com/Content.aspx?id=351435>> accessed 29 July 2016.

⁶³³ See Cherif M Bassiouni, 'Egypt's Unfinished Revolution' in Adam Roberts, Rory McCarthy and Timothy Garton Ash (eds), *Civil Resistance in the Arab Spring: Triumphs and Disasters* (OUP 2016) 57.

attackers, setting fire to police stations and vehicles and attacking the interior ministry. Violent clashes between the Mubarak's forces and protesters resulted in over 800 people being killed and over six thousand injured.⁶³⁴

In response to a situation going out of control, Mubarak dissolved his government and appointed a new vice-president. Moreover, he facilitated the formation of a new government and pledged not to seek re-election in the next presidential elections. Yet, Mubarak's actions did not quell the dissent and on 11 February 2011, Vice-President Omar Suleiman handed over power to military forces, which, in turn, suspended the constitution, dissolved the parliament and announced their intent to rule until the next elections. Mubarak was put to trial on charges of complicity in the murder of protesters but eventually released.⁶³⁵ Parliamentary elections were consequently held from November 2011 to February 2012 and presidential elections in June 2012, the latter ending with Mohamed Morsi's victory of 51,73% of total votes. He became the first democratically elected president of Egypt.

International response to the uprising was similar to that in Tunisia. International and regional organisations as well as a large number of mostly Western European and North American states supported the protestors' call for political change and condemned the use of violence against demonstrators. They urged the Egyptian government to respect human rights to freedom of expression and assembly and called for transition process. To illustrate, the UN Secretary-General commended 'the people of Egypt for the peaceful, courageous and orderly manner in which they have exercised their legitimate rights' and called on 'transition that meets the legitimate aspirations of the Egyptian people and includes free, fair and credible elections'.⁶³⁶ To assist the transition, the UN Department of Political Affairs dispatched electoral offices to provide electoral support and advice during the 2011-12 elections.⁶³⁷ Similarly, the AU PSC expressed unequivocal support of the protestors and noted:

[T]he deep aspirations of the Egyptian people, especially its youth, to change and the opening of the political space in order to be able to democratically designate institutions that are truly representative and respectful of freedoms and human rights; [and] expresse[d] AU solidarity with the Egyptian people whose desire for democracy is consistent with the relevant instruments of the

⁶³⁴ Human Rights Watch, *World Report 2012: Events of 2011* (New York, HRW 2012) 546.

⁶³⁵ For a more complete overview of the events see 'Egypt Uprising of 2011', *Encyclopedia Britannica* (2016) <<https://global.britannica.com/event/Egypt-Uprising-of-2011>> accessed 11 August 2016.

⁶³⁶ UN Secretary-General, 'Secretary-General's Statement on the Situation in Egypt' (New York, 11 February 2011) <<https://www.un.org/sg/en/content/sg/statement/2011-02-11/secretary-generals-statement-situation-egypt>> accessed 11 August 2016.

⁶³⁷ UNDP, '2012 Annual Report' (May 2013) at 13 <<http://www.un.org/undpa/sites/www.un.org.undpa/files/DPA%202012%20Annual%20Report-Multi-Year%20Appeal%20web.pdf>> accessed 11 August 2016.

AU and the continent's commitment to promote democratization, good governance and respect for human rights.⁶³⁸

This was echoed by the Arab League, which stressed the inadequacy of Mubarak's superficial reshuffling policy by stating that 'new ministers does not necessarily mean a change' and claimed that 'clear lines of policy will have to be declared',⁶³⁹ as well as by the EU, which urged the Egyptian authorities 'to fully respect and protect the rights of their citizens to manifest their political aspirations'.⁶⁴⁰ Similar statements of support with even more open-ended wording were expressed by, among others, Canada, Cuba, United States, Nigeria, South Africa, India, Sri Lanka, Iran, Iraq and Turkey.⁶⁴¹ Only a small number of states, for primarily geopolitical reasons, condemned the protests and voiced support for Mubarak, including Saudi Arabia, Libya, Kuwait and Israel. Yet, as in Tunisia, none of these states and international organisations took coercive measures to exert impact on the events in Egypt. Egypt's first democratically elected president was internationally recognised, notwithstanding the fact that the presidential elections were held in discord with the Egyptian constitution and were characterised as unconstitutional by the Supreme Constitutional Court.⁶⁴² As Trager elucidates, '[t]he international community was far less averse to its [the Muslim Brotherhood, Morsi's party] emergence that it anticipated. Foreign officials routinely encouraged the Brotherhood to respect the peace treaty with Israel and embrace pluralism but exerted no significant pressure toward those ends'.⁶⁴³ For instance, Washington declared its full embrace of the Arab Spring: '[I]t will be the policy of the United States to promote reform across the region, and to support transitions to democracy [...] That effort begins in Egypt and Tunisia'. It was further emphasised that 'both nations can set a strong example through free and fair elections; vibrant civil society; accountable and effective democratic institutions; and responsible regional leadership'.⁶⁴⁴

⁶³⁸ AU PSC, 'Communique of the 260th Meeting of the Peace and Security Council' (Addis Ababa, 16 February 2011) PSC/PR/COMM.(CCLX) para 2.

⁶³⁹ 'Arab League Head Wants Egypt Multi-Party Democracy' *Reuters* (30 January 2011) <<http://www.reuters.com/article/us-egypt-moussa-idUSTRE70T1QE20110130>> accessed 11 August 2016.

⁶⁴⁰ 'EU Calls on Egypt to Respect Right to Protest' *EUbusiness* (27 January 2011) <<http://www.eubusiness.com/news-eu/egypt-politics.8c2>> accessed 11 August 2016.

⁶⁴¹ See 'International Reactions to the Egyptian Revolution' *Wikipedia* <https://en.wikipedia.org/wiki/International_reactions_to_the_Egyptian_Revolution_of_2011> accessed 11 August 2016.

⁶⁴² See eg Marina Ottaway, 'Egypt's Struggle for Power' *CFR.org* (4 December 2012) <<https://www.cfr.org/interview/egypts-struggle-power>> accessed 4 August 2017; David D Kirkpatrick, 'Blow to Egypt Transition as Court Dissolves Parliament' *The New York Times* (New York, 14 June 2012) A1.

⁶⁴³ Eric Trager, *Arab Fall: How the Muslim Brotherhood Won and Lost Egypt in 891 Days* (Georgetown UP 2016) 88.

⁶⁴⁴ 'Obama Middle East Speech in Full with Analysis' *BBC News* (19 May 2011) <<http://www.bbc.co.uk/news/mobile/world-us-canada-13461682>> accessed 4 August 2017.

6.6.1.3. Libya

Of all states affected by the Arab Spring, Libya underwent one of the most, if not the most, traumatic experience since the popular protests, inspired by the success of the uprisings in Tunisia and Egypt, grew into a full-blown civil war marked by the international armed interference and culminating in the death of its tyrannical leader Colonel Muammar el-Qaddafi and key political figures, who ruled the country for 42 years.

Qaddafi's sultanist regime kept Libya in iron hands since the military coup in 1969. His politics that combined socialism, pan-Arab nationalism, tribalism and anti-imperialism allegedly aimed to engineer a forward-looking republic governed by people — which is also visible from the title of the Libyan state: the Socialist People's Libyan Arab Jamahiriya — essentially led to the creation of a non-state. Moreover, considering the turbulent history of Libya and constant lack of independence, Libya was said to be an artificial state created by external powers and lacking national identity, which was efficiently exploited by Qaddafi to entrench his unchallenged power and dominance.⁶⁴⁵

Inspired in part by the success of the Tunisian and Egyptian revolutions, the first demonstrations demanding Gaddafi's withdrawal took place in the city of Benghazi on 15 February 2011 and were harshly repressed. The root of the problem was poverty and political oppression. Indeed, for about a half-century Libya was dominated by a political vision that formally denied any form of civil activism outside the governing regime. Those who attempted to challenge the government faced unlimited imprisonment and death.⁶⁴⁶ By 20 February, protests had spread to the capital Tripoli where they were followed by huge military campaign on the part of the Gaddafi regime. With the rising death toll, numbering in thousands, the situation quickly degenerated into a civil war. By the end of August, Tripoli was in the hands of the opposition and Gaddafi was forced to flee, before being killed on 20 October 2011.

The violence used against protesters was strongly criticised by the Arab League and the African Union. On 21 February 2011, Libya was suspended from the League,⁶⁴⁷ whereas the AU asserted that the demands of the Arab people for change were legitimate.⁶⁴⁸ On 26 February, the UNSC adopted Resolution 1970 under the Chapter VII of the UN Charter, which condemned

⁶⁴⁵ See Jackson N Maogoto and Andrew Coleman, 'Changing the Guard — the Price of Democracy: Lessons from the Arab Spring on Constitutionalism' in Carlo Panara and Gary Wilson (eds), *The Arab Spring: New Patterns for Democracy and International Law* (Martinus Nijhoff 2013) 10-12.

⁶⁴⁶ See George Joffe, 'Civil Resistance in Libya during the Arab Spring' in Adam Roberts, Rory McCarthy and Timothy Garton Ash (eds), *Civil Resistance in the Arab Spring: Triumphs and Disasters* (OUP 2016) 117.

⁶⁴⁷ 'The Arab League Suspends Libya until Demands of the People Are Met' *BBC* (23 February 2011) <http://www.bbc.co.uk/worldservice/africa/2011/02/110223_libya_arableague_focus.shtml> accessed 13 September 2016.

⁶⁴⁸ AU PSC, 'Communique of the 261 Meeting of the Peace and Security Council of the African Union' (Addis Ababa, 23 February 2011) PSC/PR/COMM(CCLXI) para 5.

‘the violence and the use of force against civilians’ and demanded ‘an immediate end to the violence and [...] steps to fulfil the legitimate demands of the population’.⁶⁴⁹ The resolution also inflicted Chapter VII sanctions on Libya, including an arms embargo; a travel ban against sixteen Libyan officials involved in violence; and an indefinite asset freeze against six members of the regime.⁶⁵⁰ In addition, the Libyan case was referred to the ICC for investigation of the crimes against humanity that were allegedly committed by Libya’s regime.⁶⁵¹ More unprecedentedly, on 1 March 2011, the UNGA suspended Libya’s membership in the Human Rights Council, the Organisation’s pre-eminent human rights body.⁶⁵² Such a move was welcomed by the UN Secretary-General Ban Ki-moon who stated that ‘[t]he winds of change are sweeping the Middle East and North Africa’ and the UN stood ready to assist in every way possible as the people of Libya demanded new rights and freedoms.⁶⁵³ Inspired by the international support, the rebel forces established the National Transitional Council of Libya (NTC) on 27 February 2011, which on 5 March 2011 declared itself to be the ‘only legitimate body representing the people of Libya and the Libyan state’.⁶⁵⁴

When it became clear that the 1970-resolution measures were not protecting the Libyan people — due to Gaddafi regime’s blatant breaches of the resolution — the League of Arab States called on the SC to impose a non-fly zone on Libyan military aviation and to establish safe areas to protect the civilian population. This initiative was crucial and led to the adoption of UNSC Resolution 1973 on 17 March 2011, which referred to ‘the legitimate demands of the Libyan people’, reiterated the Council’s concern that crimes against humanity might have been committed and defined the situation in Libya as a threat to international peace and security.⁶⁵⁵ Additionally, it reaffirmed the establishment of a no-fly zone and ban on flights; added additional designations of individuals subject to travel ban or the asset freeze; reinforced arms embargo; and authorised the use of ‘all necessary measures [...] to protect civilians and civilian-populated areas under threat of attack [...] while excluding a foreign occupation force of any form on any part of Libyan territory’.⁶⁵⁶

Resolution 1973 served as a legal justification for subsequent NATO’s military intervention in Libya in the form of air strikes aimed to protect the civilian population. This resolution has been arguably the first implementation of the R2P doctrine. Military intervention significantly weakened the position

⁶⁴⁹ UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970, para 1.

⁶⁵⁰ *ibid* paras 9–10, 15, 17.

⁶⁵¹ *ibid* para 4.

⁶⁵² ‘General Assembly Suspends Libya from Human Rights Council’ (1 March 2011) UN Doc GA/11050 (press release).

⁶⁵³ ‘Secretary-General’s Remarks to the General Assembly on Libya’ (New York, 1 March 2011) <<http://www.un.org/sg/STATEMENTS/index.asp?nid=5116>> accessed 7 July 2016.

⁶⁵⁴ ‘Interim Transitional National Council’ *Temehu* <<https://www.temehu.com/ntc.htm>> accessed 7 July 2016.

⁶⁵⁵ UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973, para 1.

⁶⁵⁶ *ibid* paras 4, 6–8, 13, 19, 22.

of the Gaddafi and forced him to relinquish power. He was subsequently killed by the opposition forces on 20 October 2011. Meanwhile, the opposition-formed NTC gained country-wide support and international recognition (first as the legitimate representative of the people of Libya and at a later stage as a government)⁶⁵⁷ and occupied the country's seat at the United Nations.⁶⁵⁸ In July 2012, parliamentary elections were held and in August 2012, the NTC handed power to the elected General National Assembly.⁶⁵⁹ As the above analysis reveals, the pro-democratic revolution in Libya attracted the most forcible response from states and international organisations and can be regarded as the most powerful case of the recognition of the right to revolution. Importantly, the reaction of the AU to the overthrow of the Libyan regime was remarkable. The popular uprisings of 2011 were not regarded in the same light as the *coups d'état* that the AU has acted against elsewhere on the continent.

6.6.1.4. Syria

The last case to consider here is that of Syria, which represents the least successful example of people's struggle for democracy in the course of the Arab Spring, with a full-blown civil war still plaguing the country. Syrian revolution began with small and peaceful protests taking place in the city of Daraa on 15 March 2011 in response to the detention and torture of some teenagers for painting a graffiti 'The people want the fall of the regime' on the walls of their schools. Apart from demonstrating their outrage over the fate of the teenagers, the protestors demanded democratic reforms, release of political prisoners, more political freedom, abolition of emergency laws and an end to corruption. The government responded by shooting demonstrators with open fire, which resulted in several deaths and the attendant increase in numbers of protestors. By July 2011, hundreds of thousands were taking to the streets throughout the country calling not only for political reforms but also for the outright overthrow of the Assad government. After the failure to pacify the opposition actors by offering piecemeal reforms and promises of greater democratisation, Assad resorted to even deadlier campaign of violence and repression: the towns were attacked by a full-scale military artillery including tanks, infantry carriers, jets and chemical weapons, with the death toll mounting to 500,000 plus people by late 2018.⁶⁶⁰ To defend themselves and

⁶⁵⁷ For a detailed discussion, see Stefan Talmon, 'Recognition of the Libyan National Transitional Council' (2011) 15 ASIL Insights <<https://www.asil.org/insights/volume/15/issue/16/recognition-libyan-national-transitional-council>> accessed 28 March 2017.

⁶⁵⁸ 'After Much Wrangling, General Assembly Seats National Transitional Council of Libya as Country's Representative for Sixty-Sixth Session' (16 September 2011) UN Doc GA/11137 (press release).

⁶⁵⁹ 'Libya's NTC Hands Power to Newly Elected Assembly' *BBC News* (9 August 2012) <<http://www.bbc.com/news/world-africa-19183300>> accessed 29 July 2016.

⁶⁶⁰ 'Death Count in Syria', *I Am Syria* <<http://www.iamsyria.org/death-tolls.html>> accessed 10 December 2018.

their areas of control, opposition supporters began to take arms and a full-blown countrywide civil war unfolded.⁶⁶¹ In November 2012, the National Coalition for Syrian Revolutionary and Opposition Forces, commonly named the Syrian Opposition Coalition (SOC), was established in Qatar to serve as a centre of coordination between opposition's different factions and foreign backers.

Repression of the civilian population by the Assad regime has been met with limited international measures. The UNSC struggled to reach an agreement on resolutions condemning and sanctioning the Assad regime under Chapter VII of the UN Charter, which was eventually precluded by three consecutive vetoes by China and Russia.⁶⁶² This notwithstanding, the SC could agree on several presidential statements and resolutions not referring to Chapter VII measures, in which it condemned the violations of human rights committed by the Syrian government and called on the Syrian authorities to cease violence whilst reaffirming its commitment to the principles of sovereignty and territorial integrity of Syria.⁶⁶³ Furthermore, in order to put more pressure on the Assad regime, the UNGA's Third Committee adopted a resolution condemning human rights violations in Syria.⁶⁶⁴ Meanwhile, the Arab League imposed economic sanctions on the Syrian regime,⁶⁶⁵ including travel bans, asset freezes and financial transactions cuts and agreed to send

⁶⁶¹ See 'Syrian Civil War' *Wikipedia* <https://en.wikipedia.org/wiki/Syrian_civil_war> accessed 11 August 2016.

⁶⁶² See UNSC Draft Res 612 (4 October 2011) UN Doc S/2011/612 ('Recalling the Syrian Government's primary responsibility to protect its population [...], stressing the need to address 'the legitimate aspirations and concerns of the population [...]' [e]xpresses its intention to review Syria's implementation of this resolution within 30 days and to consider its options, including measures under Article 41 of the Charter of the United Nations'); UNSC Draft Res 538 (19 July 2012) UN Doc S/2012/538 ('Determining that the situation in Syria constitutes a threat to international peace and security, acting under Chapter VII of the Charter of the United Nations [...] decides that, if the Syrian authorities have not fully complied with paragraph 4 above within ten days, then it shall impose immediately measures under Article 42 of the UN Charter'); UNSC Draft Res 348 (22 May 2014) UN Doc S/2014/348 [Sponsored by 66 member states] ('Determining that the situation in the Syrian Arab Republic constitutes a threat to international peace and security, decides to refer the situation [...] to the Prosecutor of the International Criminal Court').

⁶⁶³ See eg UNSC Presidential Statement 16 (2011) UN Doc S/PRST/2011/16; UNSC Presidential Statement 10 (2012) UN Doc S/PRST/2012/10; UNSC Presidential Statement 15 (2013) UN Doc S/PRST/2013/15; UNSC Res 2042 (14 April 2012) UN Doc S/RES/2042; UNSC Res 2043 (21 April 2012) UN Doc S/RES/2043; UNSC Res 2118 (27 September 2013) UN Doc S/RES/2118; UNSC Res 2139 (22 February 2014) UN Doc S/RES/2139; UNSC Res 2165 (14 July 2014) UN Doc S/RES/2165; UNSC Res 2209 (6 March 2015) UN Doc S/RES/2209; UNSC Res 2235 (7 August 2015) UN Doc S/RES/2235; UNSC Res 2254 (18 December 2015) UN Doc S/RES/2254; UNSC Res 2268 (26 February 2016) UN Doc S/RES/2268. For a full list of documents on Syria, see Security Council Report, 'UN Documents for Syria' <<http://www.securitycouncilreport.org/un-documents/syria/>> accessed 12 August 2016.

⁶⁶⁴ UN Department of Public Information, 'Third Committee approves Resolution condemning human rights violations in Syria, by vote of 122 in favor to 13 against, with 41 abstentions', GA/SHC/4033 (22 November 2011).

⁶⁶⁵ League of Arab States Res 7442 (Extraordinary Session, 27 November 2011).

monitors to observe the situation in Syria.⁶⁶⁶ Following the failure of the observer mission, the League suspended Syria's membership.⁶⁶⁷ Likewise, the EU has introduced comprehensive restrictive measures against the Syrian regime, including asset freezes, travel bans, bans on import/export of oil and arms bans.⁶⁶⁸ Several regional countries, such as Saudi Arabia, Qatar and Turkey, acted on their own by offering significant financial, material and logistical aid to the opposition fighters. Additionally, a range of Western states stated that President Assad lost legitimacy and should step down as well as imposed autonomous sanctions.⁶⁶⁹

Shortly after its formation, the SOC was recognised as 'the legitimate representative of the Syrian people'.⁶⁷⁰ Whilst for the majority of scholars such status does not bear legal consequences (as it was a political act of recognition rather than legal),⁶⁷¹ its political significance as a signal of support to revolutionary aspirations of people should not be underestimated. As Wilson observed, this type of recognition implies that these collectivises are 'authorities in their own right in international law, capable of legitimately resorting to the use of force'.⁶⁷² In fact, the absence of the legal recognition of the SOC was due to the fact that it did not exercise effective control over the whole territory of Syria. Otherwise, such recognition would absolve leaders

⁶⁶⁶ League of Arab States Res 7441 (Extraordinary Session, 24 November 2011). See also Neil MacFarquhar and Nada Bakri, 'Isolating Syria, Arab Group Sets Broad Sanctions' *New York Times* (New York, 28 November 2011) A1.

⁶⁶⁷ League of Arab States Res 7438 (Extraordinary Session, 12 November 2011).

⁶⁶⁸ See Council Regulation (EU) 442/2011 of 9 May 2011 concerning restrictive measures in view of the situation in Syria [2011] OJ L121/1; Council Decision 2011/273/CFSP of 9 May 2011 concerning restrictive measures against Syria [2011] OJ L121/11, para 11.

⁶⁶⁹ See eg 'Clinton Says Assad Has "Lost Legitimacy"' *Aljazeera* (12 July 2011) <<http://www.aljazeera.com/news/middleeast/2011/07/201171204030379613.html>> accessed 15 August 2016; 'Declaration by the High Representative, Catherine Ashton, on Behalf of the European Union on EU Action Following the Escalation of Violent Repression in Syria' (Brussels, 18 August 2011) 13488/1/11 REV 1 ('The EU notes the complete loss of Bashar al-Assad's legitimacy in the eyes of the Syrian people and the necessity of him to step aside'); 'UK, Germany and France Calls for President Assad to Stand Down' *Gov.UK* (18 August 2011) <<https://www.gov.uk/government/news/uk-germany-and-france-call-for-president-assad-to-stand-down>> accessed 16 August 2016 ('Our three countries believe that President Assad, who is resorting to brutal military force against his own people and who is responsible for the situation, has lost all legitimacy and can no longer claim to lead the country'); Craig Emerson (Acting Minister for Foreign Affairs of Australia), 'Government Calls on Syria's President Assad to Step Down, Imposes Extra Sanctions', Media Release (19 August 2011) <http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/1024474/upload_binary/1024474.pdf;fileType=application%2Fpdf#search=%22media/pressrel/1024474%22> accessed 15 August 2016.

⁶⁷⁰ Jean d'Aspremont, 'Regimes' Legitimacy Crises in International Law: Libya, Syria and Their Competing Representatives' in Rainer Grote and Tilmann J Röder (eds), *Constitutionalism, Human Rights, and Islam after the Arab Spring* (OUP 2016) 63.

⁶⁷¹ See eg Jonte van Essen, 'De Facto Regimes in International Law' (2012) 28 *Merkourios* 31, 43; Stefan Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People' (2013) 12 *Chinese JIL* 219, 231.

⁶⁷² Heather Wilson, *International Law and the Use of Force by National Liberation Movements* (OUP 1988) 117.

who still control some parts of the country of responsibilities in their areas of control. By bestowing political recognition with the SOC and yet retaining legal recognition with the incumbent regime (albeit acknowledging that it has lost legitimacy),⁶⁷³ the international community showed their support of the right to revolution of the Syrian people without undermining the traditional effective control test.

In sum, in Tunisia, Egypt, Libya and Syria, revolutions were sparked by the failure of the authoritarian regimes to guarantee economic, social and political rights of their citizens by abuse of power, denial of popular political participation, outright discrimination and repression. Revolution was the Arab Spring's ultimate tool to vindicate international human rights, including the right to democracy.

6.6.2. The Euromaidan Revolution

From November 2013 to the end of February 2014, demonstrators gathered on Kyiv's Independence Square, *Maidan Nezalezhnosti* in Ukrainian, to protest against the Ukrainian government decision to suspend preparations for signing an Association Agreement and Deep and Comprehensive Free Trade Agreement with the EU (DCFTA), choosing closer cooperation with Russia instead. These protests comprised of several distinct phases, culminating in a nation-wide revolution, commonly referred to as the Euromaidan Revolution, or Revolution of Dignity, that toppled the Victor Yanukovych's government.⁶⁷⁴

The first stage, called by some as 'Euro-romantic stage',⁶⁷⁵ began with the peaceful demonstrations of predominantly students and youths at the Maidan on 21 November 2013 outraged with the abrupt suspension by Yanukovych of the process of preparation of the DCFTA with the EU⁶⁷⁶ and demanding a

⁶⁷³ The August 2011 Declaration by France, the UK and Germany is of a particular interest here: 'President al-Assad, who is resorting to brutal military force against his own people and who is responsible for the situation, has lost all legitimacy and can no longer claim to lead the country'. 'UK, Germany and France Call for President Assad to Stand Down' *GOV.UK* (18 August 2011) <<https://www.gov.uk/government/news/uk-germany-and-france-call-for-president-assad-to-stand-down>> accessed 28 March 2017.

⁶⁷⁴ David R Marples and Frederick V Mills, *Ukraine's Euromaidan: Analyses of a Civil Revolution* (Ibidem-Verlag 2015) 9.

⁶⁷⁵ Oleksii Polegkyi, 'Ukrainian Threefold Revolution: From Soviet Ukraine to European Ukraine?' in Anne de Tinguy and Jean-Yves Moisseron (eds), *Peut-on comparer les 'révolutions de couleur' et les 'printemps arabes'?* (Les Dossiers du CERI 2016) <http://www.sciencespo.fr/ceri/fr/content/dossiersduceri/ukrainian-threefold-revolution-soviet-ukraine-european-ukraine#footnoteref1_kw0lssw> accessed 15 August 2016 (According to him, Ukrainian 2014 Revolution consisted of three consecutive phases: 'Euro-romantic stage' (21-30 November 2013), the 'Claim of justice' (1 December - 16 January 2014) and 'Reset of the system' (16 January - 22 February 2014)).

⁶⁷⁶ 'Government Adopted a Decree on Suspension of the Process of Preparation for the Association Agreement with the EU' *Uryadovyy Portal* (21 November 2013)

return to a pro-European direction in foreign politics. In the eyes of many Ukrainians, the Ukraine-EU Association Agreement was a first step towards European integration, which would bring not only development and economic modernisation but also a change of the ‘rules of the game’ on the national political arena leading to the abolishment of corruption, kleptocracy and authoritarian turns.⁶⁷⁷ On 30 November 2013, demonstrators were brutally beaten by *Berkut*, the Ukrainian special force. The brutality against students served as a catalyst for phase two of Euromaidan — a mass action of a national scope demanding Yanukovych and his corrupted cabinet to resign. The protests were now less about the closer Ukraine-EU cooperation and more about the outright regime change. More attention was now centred on corruption, kleptocracy and the failure of the ruling elites to reform Ukrainian post-Soviet political space and to improve socio-economic conditions of the people, with the postponement of the Association Agreement being last drop in the ocean of general frustration. It was a revolution for dignity and against violations of basic human rights by the Ukrainian government.⁶⁷⁸ In addition, Ukrainians were demanding a restoration of Ukraine’s 2004 Constitution, which was suspended by Yanukovych in an effort to strengthen his power.⁶⁷⁹ The protesters viewed such action as contrary to national interests and submissive towards Russian avail.⁶⁸⁰ In an effort to deescalate the crisis, the opposition began negotiating with Yanukovych and reporting regularly to Euromaidan. Meanwhile, the government-sponsored provocateurs, commonly dubbed as ‘Titushky’, began undermining the peaceful nature of the protest by sabotage and incitement to violence against police. Moreover, government-controlled media resorted to a campaign of misinformation by calling Euromaidan a fascist movement. A number of protestors were killed and over a hundred were declared missing.

<http://www.kmu.gov.ua/control/uk/publish/article?art_id=246868715&cat_id=244274160-16> accessed 15 August 2016.

⁶⁷⁷ Yuriy Shveda, ‘The Revolution of Dignity in the Context of Social Theory of Revolutions’ (2014) 42 RSEW 20, 21.

⁶⁷⁸ Oleksii Polegkyi, ‘Ukrainian Threefold Revolution: From Soviet Ukraine to European Ukraine?’ in Anne de Tinguy and Jean-Yves Moissoner (eds), *Peut-on comparer les ‘révolutions de couleur’ et les ‘printemps arabes’?* (Les Dossiers du CERI 2016) <http://www.sciencespo.fr/ceri/fr/content/dossiersduceri/ukrainian-threefold-revolution-soviet-ukraine-european-ukraine#footnoteref1_kw0lssw> accessed 15 August 2016.

⁶⁷⁹ In 2010, President Yanukovych initiated a constitutional reform through the venue of the Ukrainian Constitutional Court to reinstall the 1996 Constitution establishing presidential system of government. The Court adopted a decision recognising the unconstitutionality of the 2004 amendments to the Ukrainian constitution and declared a return to the 1996 constitution. See Decision of the Constitutional Court of Ukraine Concerning the Compatibility of the 2004 Amendment with the Constitution of Ukraine, Case 1-45/2010 (30 September 2010). The reinstatement of the 2004 constitution occurred through the parliamentary act ‘On Renewal of the Legality of Certain Provisions of the Constitution of Ukraine’ of 21 February 2014, No 742-VII.

⁶⁸⁰ See Matthew Emery, ‘Ukraine: Analyzing the Revolution and NATO Action in Light of the U.N. Charter and *Nicaragua*’ (2016) 30 Emory Int’l L Rev 433, 440.

The crisis entered its third stage when the Yanukovych's party, the Party of Regions, passed a series of anti-protest laws, using the Russian legislation as a model, to restrict the freedom of speech and assembly by introducing severe penalties.⁶⁸¹ This action by the President effected a wave of outrage and anger among the protestors, who began to use sticks, rocks, molotov cocktails and burning tires to protect themselves. The crisis reached its climax at the end of February. From 18 to 21 February two major bloody attacks were directed against the protesters by the riot police, including throwing grenades and shooting from the rooftops resulting in over 100 dead, coming to be known as the 'Heaven hundred', and over 1000 injured. The violence was unprecedented in the history of independent Ukraine and yielded disastrous repercussions for the incumbent regime. The final phase was marked by Yanukovych and his close government officials fleeing the country and an interim government being formed on 27 February 2014. The interim government reinstated the December 8, 2004 amendments of the constitution weakening presidential powers, dismissed a number of cabinet ministers, impeached the President on the basis that he had abandoned his office and set new presidential elections for 25 May 2014.⁶⁸²

As in the Arab Spring, the international community sided with the protesters. The UN Secretary-General Ban Ki-moon at press conference in Lima appealed 'to all parties to act with restraint, avoid further violence and to uphold the democratic principles of freedom of expression and peaceful assembly'.⁶⁸³ Likewise, NATO Secretary General Anders Rasmussen has called on Ukraine 'to live up to fundamental democratic principles including freedom of assembly and freedom of expression'.⁶⁸⁴ The Council of the EU adopted Conclusions on 10 February 2014 where, in a language similar to that used in the Arab Spring, it urged 'all sides to seek, through an inclusive dialogue, a democratic solution that would meet the aspirations of the Ukrainian people'. Moreover, it implicitly encouraged regime change by stating that '[a] new and inclusive government, constitutional reform bringing back more balance of powers, and preparations for free and fair presidential

⁶⁸¹ 'Verhovna Rada Has Passed Laws Which Open Way to Mass Repressions' *Ukrainska Pravda* (16 January 2014) <<http://www.pravda.com.ua/news/2014/01/16/7009773/>> accessed 15 August 2016.

⁶⁸² For a more detailed timeline of the Euromaidan events, see 'A Timeline of the Euromaidan Revolution' *Euromaidan Press* (19 February 2016) <<http://euromaidanpress.com/2016/02/19/a-timeline-of-the-euromaidan-revolution/#arv1bdata>> accessed 15 August 2016. See also Yuriy Shveda and Jung Ho Park, 'Ukraine's Revolution of Dignity: The Dynamics of Euromaidan' (2016) 7 *J Eurasian Stud* 85, 86 (They distinguished between three stages of Euromaidan: 'Student's Euromaidan', 'Maidan Camp' and 'Maidan Sich').

⁶⁸³ UN Secretary-General Ban Ki-moon, 'Secretary-General's Remarks at Press Conference with President Ollanta Humala of Peru and LI Yong, Director General, United Nations Industrial Development Organization' (2 December 2013) <<https://www.un.org/sg/en/content/sg/press-encounter/2013-12-02/secretary-generals-remarks-press-conference-president-ollanta>> accessed 16 August 2016.

⁶⁸⁴ 'Rasmussen Hopes Ukraine Lives Up to Democratic Principles' *Interfax-Ukraine* (3 December 2013) <<http://en.interfax.com.ua/news/general/178955.html>> accessed 16 August 2016.

elections would contribute to bringing Ukraine back on a suitable path of reforms'.⁶⁸⁵ These views were reiterated in Conclusions of 20 February 2014, which also introduced targeted sanctions, including asset freeze and visa ban, against those responsible for use of excessive force against the protesters as well as suspension of export licenses on equipment used for internal repression.⁶⁸⁶ Moreover, on 5 March 2014, the EU adopted sanctions against sixteen Ukrainian leaders, including former President Yanukovich, in the form of asset freeze for misappropriation of Ukrainian state funds,⁶⁸⁷ which has been repeatedly updated.⁶⁸⁸ By the same token, the US, in response to Yanukovich's violent crackdown on protesters, imposed visa travel bans on around twenty senior political figures of the Ukrainian government.⁶⁸⁹ Similar notes of support condemning violence against the protesters and calling on the Ukrainian government to listen to the aspirations of the Ukrainian people were aired by other states, including Australia, Bulgaria, Canada, Colombia, Germany, Hungary, Latvia, Lithuania, Sweden and the UK.⁶⁹⁰ On the other hand, Russia, who saw Euromaidan as a threat of losing control over the Ukrainian geopolitical space, condemned the revolution by calling it 'more like a pogrom [violent persecution of ethnic minorities] than a revolution'.⁶⁹¹ On 10 December, the State Duma adopted a resolution blaming Western states for manipulating the political crisis in Ukraine to their advantage: 'Some Western

⁶⁸⁵ Council of the EU, 'Council Conclusions on Ukraine', Foreign Affairs Council Meeting (Brussels, 10 February 2014) <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/140960.pdf> accessed 16 August 2016.

⁶⁸⁶ Council of the EU, 'Council Conclusions on Ukraine', Foreign Affairs Council Meeting (Brussels, 20 February 2014) <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/141110.pdf> accessed 16 August 2016.

⁶⁸⁷ Council Decision 2014/119/CFSP of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine [2014] OJ L66/26.

⁶⁸⁸ See Council Decision 2015/364/CFSP of 5 March 2015 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine [2015] OJ L62/25; Council Decision 2015/876/CFSP of 5 June 2015 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine [2015] OJ L142/30; Council Decision 2015/1781/CFSP of 5 October 2015 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine [2015] OJ L259/23; Council Decision 2016/318/CFSP of 4 March 2016 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine [2016] OJ L60/76.

⁶⁸⁹ 'EU and US Consider Sanctions against Ukraine as Death Toll Reaches 26' *The Guardian* (20 February 2014) <<https://www.theguardian.com/world/2014/feb/19/eu-us-consider-sanctions-ukraine-protest-deadly-violence>> accessed 16 August 2016.

⁶⁹⁰ See 'International Reactions to Euromaidan' *Wikipedia* <https://en.wikipedia.org/wiki/International_reactions_to_the_Euromaidan> accessed 16 August 2016.

⁶⁹¹ 'Ukraine Protests "More like a Pogrom than a Revolution" Says Putin' *The Telegraph* (2 December 2013) <<http://www.telegraph.co.uk/news/worldnews/europe/ukraine/10489133/Ukraine-protests-more-like-a-pogrom-than-a-revolution-says-Putin.html>> accessed 16 August 2016.

politicians who address oppositionist meetings make explicit calls for revolting against the decisions passed by the legitimately elected authorities of the country'.⁶⁹² Considering the important role Russia plays on the global political arena, one should nonetheless remain cautious with regard to the merit and legal impact of this particular position: the *de facto* rationale behind condemning the Ukrainian revolution squared around the fact that the ouster of the puppet Russia-controlled Yanukovich's regime meant the long-feared shift of power balance in Eastern Europe towards the West, whereas actual statements referring to violations of international and/or Ukrainian laws served a misguiding rhetoric. Another obvious aim of such allegations was to justify the Russian annexation of Crimea of 18 March 2014 as an alleged measure to protect ethnic Russians in the peninsular from 'fascist and Russophobic' government established by the 'Maidan mob'. Even when Russia did frame its arguments in language of international law, they were inconsistent, lacked factual basis and represented a particular reading of international law favouring Russian interests, which came to be known as 'Russian doctrine of international law'.⁶⁹³

In the aftermath of the Euromaidan Revolution, the international community continued to support 'legitimate aspirations of the Ukrainian people' by according recognition to the interim government headed by the opposition representative Arseniy Yatsenyuk as well as the interim president Oleksandr Turchynov.⁶⁹⁴ Whereas in Libya and Syria, the NTC and the SOC were merely recognised as 'the sole representatives of peoples', the interim government of Ukraine attained a legal recognition *in toto*. Because the government, including the President, Prime Minister and Cabinet, was formed in violation of the Ukrainian constitution,⁶⁹⁵ the act of recognition of such

⁶⁹² 'State Duma of Russia in Its Statement on Ukraine Condemned Maidan and the Actions of the EU' *Liga.Novosti* (10 December 2013) <http://news.liga.net/news/politics/940370-gosduma_rf_v_zayavlenii_po_ukraine_osudila_maydan_i_deystviya_es.htm> accessed 16 August 2016.

⁶⁹³ See eg Oleksandr Zadorozhnyi, *Russian Doctrine of International Law After the Annexation of Crimea* (Taras Shevchenko Kyiv National UP 2015); Lauri Mälksoo, *Russian Approaches to International Law* (OUP 2015).

⁶⁹⁴ For more details, see OT Voloschuk, 'Vyznannya Glavy Derzhavy u Svitli Konstytucijnogo ta Mizhnarodnogo Prava [Recognition of Head of State in Light of the Rules of Constitutional and International Law]' (2014) *Visnyk Centralnoi Vybornochoi Komisii* 66, 71.

⁶⁹⁵ According to article 108 of the Ukrainian Constitution, '[t]he powers of the President of Ukraine terminate prior to the expiration of term in cases of: 1) resignation; 2) inability to exercise his or her powers for reasons of health; 3) removal from the office by the procedure of impeachment; 4) death.' None of these grounds was realised when the Verhovna Rada adopted a Decree 'On Self-Withdrawal of the President of Ukraine from Exercising His Constitutional Powers and Setting Early Elections of the President of Ukraine' (22 February 2014) No 757-VII. Even if one were to accept that the impeachment procedure was justifiable in view of Yanukovich's alleged 'treason or other crime', the Constitution requires three-quarters of the 'constitutional composition' of the Verhovna Rada to vote in favour of impeachment. Of 450 members, 328 voted to oust the President, which does not meet the three-quarters requirement of 337 votes. Moreover, the Constitution requires an investigation and judgement from the Constitutional Court before the actual impeachment procedure (art 111), and neither of these happened. See also Matthew Emery, 'Ukraine: Analyzing the Revolution and NATO Action in

government is the strongest evidence of the acceptance by the international community of the right to revolution. On top of that, the early presidential elections held on 25 May 2014 were internationally recognised as free and genuine and in accordance with international democratic standards.⁶⁹⁶ The legitimacy of the newly elected President Petro Poroshenko, winning more than fifty-five percent of the popular vote, was also recognised by Russia.⁶⁹⁷ Such international recognition of the *de facto* post-revolutionary government (because it would not be in power but for Ukraine's unconstitutional ouster and was, thus, not *de jure* or established by law) as legitimate is particularly spectacular if one considers the fact that the government in question does not have effective control over the whole Ukraine territory — the eastern Ukrainian region of Donbas, including the Donetsk and Luhansk provinces, is still under the control of pro-Russian rebels, not to mention the Russia-annexed Crimea. Needless to say, the 'effective control test' is a generally recognised method for testing legitimacy of a government, under which a *de facto* government can only be accorded legitimacy if it maintains effective control over territory it purports to govern.⁶⁹⁸ Kelsen's doctrine of revolutionary

Light of the U.N. Charter and *Nicaragua*' (2016) 30 Emory Int'l L Rev 433, 459, 463-64 (Claiming that 'the Verkhovna Rada's removal of President Yanukovych was unconstitutional'. He further affirmed that '[t]he appointed interim government was not legitimate, and the current government that was established by the interim government is not legitimate'). See also David Morrison, 'Why is the Ukraine Regime Wholly Illegitimate' (18 April 2014) <<http://www.david-morrison.org.uk/ukraine/why-ukrainian-regime-illegitimate.htm>> accessed 16 August 2016. But see Myroslava M Antonovych and others, *Українська Революція гідності, агресія РФ і міжнародне право: Монографія* [Ukrainian Revolution of Dignity, Russian Aggression and International Law: A Monograph] (Ukrainska Asotsiatsiya Mizhnarodnogo Prava 2014) 120 (Claiming that the absence of such a ground for removing the President from power is 'a qualified silence of the Constitution' and should be considered in interpreting article 108); Oleksandr Zadorozhnii, *Russian Doctrine of International Law After the Annexation of Crimea* (Taras Shevchenko Kyiv National UP 2015) 20-21 (Stating that article 102 of the Constitution of Ukraine defining the President as a guarantor of state security read in conjunction with other articles defining the role and functions of the President implies that the actual termination by the President of performing his duties constitutes a threat to the security of state and its citizens and should immediately be resolved).

⁶⁹⁶ See eg European Network of Election Monitoring Organizations, 'Ukraine Early Presidential Elections, 25 May 2014', Final Report (July 2014) <<http://www.enemo.eu/press/Ukraine2014/ENEMO%20Final%20Report%20UKRAINE%202014.pdf>> accessed 16 August 2016; OSCE Office for Democratic Institutions and Human Rights, 'Ukraine Early Presidential Election, 25 May 2014', Final Report (30 June 2014) <<http://www.osce.org/odihr/elections/ukraine/120549?download=true>> accessed 16 August 2016; Ukrainian World Congress, 'International Election Observation Mission to the Early Presidential Election in Ukraine, 24 May 2014', Final Report <[http://www.ukrainianworldcongress.org/UserFiles/File/Elections-2014/UWC%20IEOM%20Final%20Report_23072014%20\(Eng\).pdf](http://www.ukrainianworldcongress.org/UserFiles/File/Elections-2014/UWC%20IEOM%20Final%20Report_23072014%20(Eng).pdf)> accessed 16 August 2016.

⁶⁹⁷ 'Lavrov: Russia Recognized Poroshenko as the President of Ukraine' *Argumenty i Fakty* (25 August 2014) <<http://www.aif.ru/politics/world/1323568>> accessed 18 August 2016.

⁶⁹⁸ The legitimacy of a *de jure* government, that is which is established through a due process, is automatically presumed. See eg *Tinoco Claims Arbitration (Great Britain v Costa Rica)* (1923) 1 RIAA 369, 381; *Autocephalous Greek Orthodox Church of Cyprus v Goldberg (Northern Cyprus)* (1990) 917 F.2d 278, 293-94 (In ascertaining the existence (and legitimacy)

legality is premised on this idea.⁶⁹⁹ The post-revolutionary Ukrainian government allegedly fails this test and is yet recognised as legitimate by the international community.

In summary, similarly to the Arab Spring uprisings, the 2014 Ukrainian revolution represents a case of the justified revolution when peaceful means to protect human rights, such as peaceful rallies and demonstrations, were exhausted and the people had a right to revolt as a last remedy against governmental abuse. Thus, the right to revolution was triggered by a chain of events, which include the usurpation of power by the Yanukovich's regime in executive coup, whereby the Ukrainian Parliament, the Supreme Court and the Constitutional Court were factually deprived of their constitutional powers; multiple violations of the Ukrainian Constitution and laws by the incumbent government, including the controversial Kharkiv Accords of 2010 extending the Russian lease on naval facilities in Crimea until 2042⁷⁰⁰ and the one-man decision on the suspension of Ukraine-EU Association Agreement as a result of the clandestine arrangements with Russia resulting in the latter's loan worth USD 15 billion; constant and innate corruption on the part of Yanukovich and his close circles against the background of deteriorating standards of living of the Ukrainian population and declining of the rule of law; the adoption of the 'Draconian Laws' of 16 January 2014 virtually abolishing the freedoms of expression, assembly and association; and the use of violent force against peaceful protesters killing over 100 and injuring more than 2000 people by the end of February 2014.⁷⁰¹ The above-mentioned facts reveal that the actions by the Yanukovich's government before and during the Euromaidan created sufficient legal grounds for invoking the right to revolution against the regime since it was the last measure, or ultimate remedy, at the hands of the Ukrainians to protect their rights after the peaceful means of resolving the crisis had been exhausted. As one prominent Ukrainian scholar observed, Yanukovich by his dictatorial actions discredited himself to the point of the complete loss of legitimacy: '[B]y the moment when the peaceful protest was transforming into a rebellion, the regime had lost even marginal popular support and had transformed into a tyranny, ostensibly disregarding fundamental human rights and the rights of the people, refusing to seek social consensus, and aiming at the violent suppression of the peaceful protests, to the point of killing its

of a *de facto* government, the court looked to acquiescence of the state's population, the lack of an opposing entity claiming to be the legitimate government and territorial control over the entirety of the country, as opposed to just a portion of it).

⁶⁹⁹ See section 6.3 of this thesis.

⁷⁰⁰ 'Agreement between Yanukovich and Medvedev about Setting the Fleet until 2042' *Ukrainska Pravda* (22 April 2010) <<http://www.pravda.com.ua/articles/2010/04/22/4956018/>> accessed 17 August 2016. For an insightful discussion on the anti-constitutional nature of the Kharkiv Accords see Taras Kuzio, 'The Crimea: Europe's Next Flashpoint?' The Jamestown Foundation (November 2010) <<http://www.peacepalacelibrary.nl/ebooks/files/372451918.pdf>> accessed 17 August 2016.

⁷⁰¹ See also Oleksandr Zadorozhnii, *Russian Doctrine of International Law After the Annexation of Crimea* (Taras Shevchenko Kyiv National UP 2015) 14-15.

participants’.⁷⁰² Most importantly, the revolutionary cause of the Ukrainian people was recognised as legitimate by the international community, irrespective of the documented resort to violence by the protesters. Similarly to the Arab Spring revolutions, no separate mention was made of the impermissibility or illegality of such antigovernment force, even though the international community called upon the parties to respect the principles of peaceful exercise of the freedoms of expression and assembly. In other words, the international community implicitly accepted non-state violence in furtherance of revolution as a means to advance peoples’ democratic aspirations.

6.6.3. The Right to Revolution as a Customary Norm

As the previous sections demonstrate, the international community undertook a variety of actions in response to pro-democratic protests of the Arab Spring and the Euromaidan that could indicate support for the right to revolution: undemocratic governments have been designated as ‘illegitimate’ with their leaders being called on to resign; sanctions have been introduced against governments refusing to cede to the demands of popular protests; the cause of anti-government resistance was internationally recognised as legitimate; rebel groups fighting for democracy were assisted by foreign states; the use of force by the protestors was not explicitly condemned by the international community; military force has been used against a repressive government leading to a regime change and an instalment of a democratic government; and revolutionary governments have been recognised, albeit to different degree, by the international community despite the lack of all necessary credentials of political legitimacy. The question, thus, arises as to whether these actions suffice to claim that the right to revolution is now a norm of customary international law.

As was previously mentioned,⁷⁰³ customary international law is traditionally defined as ‘a general practice accepted as law’.⁷⁰⁴ It means that for a customary norm to emerge, two elements are to be present, namely material state practice (*usus*) and a belief that such practice is required, prohibited or allowed (*opinio juris*),⁷⁰⁵ also referred to as objective and

⁷⁰² *ibid* 16.

⁷⁰³ See section 4.2.1.

⁷⁰⁴ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute) art 38(1)(b).

⁷⁰⁵ See *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta)* (Merits) [1985] ICJ Rep 13, 29-30, para 27 (‘It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States’); *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, 97-98, paras 183-84 (Holding that the Court had to ‘direct its attention to the practice and *opinio juris* of States’); *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Merits) [2012] ICJ Rep 99, 122,

subjective elements respectively. State practice is constituted by both physical and verbal state acts as well as acquiescence and should be sufficiently uniform, extensive and of a certain duration. As to the representativeness criterion, whilst some states refrained from acting in support of the revolutions in the Arab world and Ukraine and some even outrightly condemned these, the clear majority of states demonstrated acceptance of these events by a variety of the above-enlisted acts, which fall squarely within the meaning of state practice. Moreover, states that abstained from acting can be regarded as acquiesced to the situation born by the actions of the majority of the active states, that is states supporting revolution. This last statement is not unproblematic since it implies that norm can be created by a state doing nothing and implying nothing by its non-action.⁷⁰⁶ Even if this is the case, state non-actions are never wholly legally neutral and at the bare minimum they create expectations that a state concerned will act similarly in similar situations or at least will not condemn a situation, which it previously supported by its passive behaviour. This is without the prejudice to specially affected states, which knew or might have been expected to know about the practice and whose silence is almost always acquiescence.⁷⁰⁷ The issue of duration is a bit more complicated. Some may argue that the passage of time within which the revolutions under consideration occurred, which is roughly four years, is not sufficient for a customary norm to emerge. However, there are several points to consider. First, the definition of a revolution is a fluid one, which means that certain social upheavals that might have been considered by states as revolutions in the past and with respect to which they acted accordingly are not considered here as such, including colour revolutions of the early 2000s and certain recent cases of *coups d'état*. Second, international law does not require a minimum duration of time.⁷⁰⁸ As the Court declared in the *North Continental Shelf* cases, 'the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law' as long as state practice is sufficiently extensive and uniform.⁷⁰⁹ This was confirmed by the ILC in its 2016 report elucidating that 'provided that the

para 55 ('[T]he existence of a rule of customary international law requires that there be a settled practice together with *opinio juris*').

⁷⁰⁶ To solve this theoretical conundrum, Danilenko introduced a distinction between 'abstention from acts' and 'passive practice', of which only the former can be considered as norm-creating *par excellence*. Gregory Danilenko, 'The Theory of International Customary Law' (1988) 31 German YBIL 9, 28.

⁷⁰⁷ See Maurice Mendelson, 'The Subjective Element in Customary International Law' (1996) 66 BYBIL 177, 186.

⁷⁰⁸ This was affirmed in ILC, 'Second Report on Identification of Customary International Law' by Michael Wood, Special Rapporteur (8 May—8 August 2014) UN Doc A/CN.4/672, 67 ('Provided that the practice is sufficiently general and consistent, no particular duration is required').

⁷⁰⁹ *North Sea Continental Shelf Cases (Federal Republic of Germany v Netherlands; Federal Republic of Germany v Denmark)* (Merits) [1969] ICJ Rep 3, 44, para 74.

practice is general, no particular duration is required'.⁷¹⁰ Moreover, in certain circumstances, the emergence of 'instant' custom is warranted, that is when a clear expression of *opinio juris* can altogether negate the need for a record of state practice.⁷¹¹ This is based on an idea that states are their own law-makers and if there is a sudden change of view on a given subject which is generally supported, a new rule can be born overnight, or at least very quickly. It is, hence, fair to suggest that state practice with respect to the Arab and Ukrainian revolutions was sufficiently extensive and uniform, and the short timeframe within which this practice occurred is not relevant.

However, it is less clear whether such state practice was followed by a sense of obligation (*opinio juris*). In fact, states have never referred in their verbal statements to any legal norms justifying their actions with respect to the Arab/Ukrainian uprisings, invoking instead the abstract principles of unacceptability of state violence against its citizens and the importance to respect legitimate aspirations of the people. Moreover, as some critical voices insist, over the course of the last few decades, the West-lead democratisation affected little, if at all, the Arab world with its autocratic regimes and repressive ideologies. It is often asserted that geopolitical interests and security concerns in the oil-rich Arab region are so overwhelming that international law has little say. The key factors are a reliable oil supply to the increasingly consuming Western society and the growing Islamist threat.⁷¹² Consequently, change came from within, ignited by citizens of the Arab region themselves. International actors had no choice but to succumb to these grass-root demands.⁷¹³ The question then arises as to whether international custom can be established when it is forced into existence rather than willed to. In other words, can states' 'psychological component' be qualified as *opinio juris* for the purposes of the customary norm formation when their actions have been

⁷¹⁰ ILC, 'Report of the International Law Commission on the Work of its 68th Session' (2 May—12 August 2016) UN Doc A/71/10, 77, Draft Conclusion 8, para 2.

⁷¹¹ Bin Cheng, 'Custom: The Future of General State Practice in a Divided World' in Ronald St John MacDonald and Douglas Millar Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (Martinus Nijhoff 1983) 513, 532. See also Bin Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' in Bin Cheng (ed), *Studies in International Space Law* (Clarendon Press 1997) 252 ('There is no reason why an *opinio juris communis* may not grow up in a very short period of time among all or simply some Members of the United Nations with the result that a new rule of international customary law comes into being among them').

⁷¹² See eg Editors, 'The Democracy Agenda in the Arab World' (1992) 22 MER174 <<http://www.merip.org/mer/mer174/democracy-agenda-arab-world>> accessed 3 August 2017; Eva Bellin, 'The Robustness of Authoritarianism in the Middle East: Exceptionalism in Comparative Perspective' (2004) 36 Comp Pol 139, 148-49; Ibrahim Elbadawi, Samir Makdisi and Gary Milante, 'Explaining the Arab Democracy Deficit: The Role of Oil and Conflicts' in Ibrahim Elbadawi and Samir Makdisi (eds), *Democracy in the Arab World: Explaining the Deficit* (Routledge 2011) 41ff; Tarek Masoud, 'Has the Door Closed on Arab Democracy?' (2015) 26 Journal of Democracy 74, 85.

⁷¹³ Rosa Brooks, 'Lessons for International Law from the Arab Spring' (2013) 28 Am U Int'l L Rev 713, 715-16.

guided by the demands of morality or political expediency rather than a belief that their practice is legally required?

In *North Sea Continental Shelf Cases*, the Court stated that in order for *opinio juris* to emerge, two conditions must be fulfilled:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.⁷¹⁴

This traditional understanding of the subjective element was reiterated by the ILC in 2016, who affirmed that '[t]he requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken *with a sense of legal right or obligation*'.⁷¹⁵ This notwithstanding, it is worth being reminded that the ICJ in much of its jurisprudence does not bother itself to look for proof of *opinio juris* when there is a well-established practice. The Court has shown a tendency either to give *opinio juris* a short mention or to completely disregard this.⁷¹⁶ Similarly, the International Law Association (ILA) has taken a position that *opinio juris* is not an essential element for the establishment of a customary norm affirming that 'it is not usually necessary to demonstrate the existence of the subjective element before a customary rule can be said to have come into being'.⁷¹⁷ Moreover, *opinio juris* is very difficult to prove. States are conglomerations of political actors, whose 'beliefs' are not that easily ascertainable as those of individuals. One is also to acknowledge the fact that states are all too often unwilling to reveal 'subjective' reasons behind their actions precisely in order to avoid creating legal obligations that would tie their hands in the future. Another problem relates to a deep theoretical and chronological paradox within this traditional schema of *opinio juris*: custom is created when it is believed to be preceded by an already

⁷¹⁴ *North Sea Continental Shelf Cases (Federal Republic of Germany v Netherlands; Federal Republic of Germany v Denmark)* (Merits) [1969] ICJ Rep 3, 44, para 77. This was *verbatim* reaffirmed in *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, 98-99, para 207.

⁷¹⁵ ILC, 'Report of the International Law Commission on the Work of its 68th Session' (2 May—12 August 2016) UN Doc A/71/10, 77, Draft Conclusion 9, para 1 (emphasis added).

⁷¹⁶ See Maurice Mendelson, 'The Subjective Element in Customary International Law' (1995) 66 BYBIL 177, 206-07; Brian D Lepard, 'Introduction: Why Does Customary International Law Need Reexamining?' in Brian D Lepard (ed), *Reexamining Customary International Law* (CUP 2017) 27-29.

⁷¹⁷ Committee on the Formation of Customary (General) International Law, 'Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law' in International Law Association Report of the Sixty-Third Conference (London 2000) (International Law Association, London 2000) 10.

existing norm which renders its subjective element superfluous.⁷¹⁸ Thus, for a customary norm to emerge, states must believe that they are already bound by the (non-existent) norm.

This thesis suggests that constitutionalisation of international law implies a different approach to the identification of *opinio juris*. First, custom is established whenever state actions reflect global constitutional principles, such as the respect for human rights, democracy and the rule of law, irrespective of whether they regard their behaviour as legally mandated. Such change in the attitude with respect to the relevance of moral and ethical principles to custom-development has been acknowledged by Larry May stating that *opinio juris* has broadened to include the impetus ‘to follow the norm out of a sense of legal or moral obligation’.⁷¹⁹ This view is also taken by Lepard arguing that for a customary norm to emerge it is enough for *opinio juris* to reflect a belief by states that a practice *should* be required instead of a traditional doctrinal view that it is *already* required.⁷²⁰ Moreover, in ascertaining such beliefs, one has to account for ‘fundamental ethical principles’ which states themselves recognised in the wide array of multilateral instruments, such as the UN Charter and the UDHR.⁷²¹ This position is also shared by Tasioulas who contended that ‘the ethical appeal of a candidate norm’ should feature ‘among the criteria for determining whether it is a valid norm of [customary international law] in such a way that a customary norm may exist even in the absence of widespread state practice, or even overwhelming state consent, in its favour’.⁷²² Likewise, the Trial Chamber of the ICTY held in the *Kupreskic* case that *opinio juris* may be the decisive element in the formation of customary international law ‘when the demands of humanity and dictates of public conscience’ so require.⁷²³ It seems therefore that in the context of IHRL and ICL — areas touching upon fundamental ethical issues — *opinio juris* has

⁷¹⁸ On the unresolved ‘circularity’ within the notion of *opinio juris*, see Anthony D’Amato, *The Concept of Custom in International Law* (Cornell UP 1971) 66.

⁷¹⁹ Larry May, *Crimes against Humanity: A Normative Account* (CUP 2005) 50. See also Noora J Arajärvi, ‘The Lines Begin to Blur? *Opinio Juris* and the Moralisation of Customary International Law’ (2011) Research Group on International Rule of Law, 1-2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1823288.54> accessed 17 November 2016.

⁷²⁰ Brian D Lepard, *Customary International Law: A New Theory with Practical Applications* (CUP 2010) 8; Brian D Lepard, ‘Customary International Law as a Dynamic Process’ in Curtis A Bradley (ed), *Custom’s Future: International Law in a Changing World* (CUP 2016) 63.

⁷²¹ Brian D Lepard, ‘Customary International Law as a Dynamic Process’ in Curtis A Bradley (ed), *Custom’s Future: International Law in a Changing World* (CUP 2016) 82.

⁷²² John Tasioulas, ‘Customary International Law and the Quest for Global Justice’ in Amanda Perreau-Saussine and James Bernard Murphy (eds), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (CUP 2007) 310.

⁷²³ *Prosecutor v Kupreskic* (Judgment) ICTY-95-16-T (14 January 2000) para 527 ([P]rinciples of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even when State practice is scant or inconsistent’). For an analysis of the case, see Noora Arajärvi, ‘From the “Demands of Humanity”: The Formulation of *Opinio Juris* in Decisions of International Criminal Tribunals and the Need for a Renewed Emphasis on State Practice’ in Brian D Lepard (ed), *Reexamining Customary International Law* (CUP 2017) 208-10.

undergone a process of moralisation, that is moral considerations and ethical principles are the key factors to account for in ascertaining the existence of an international customary norm.

It has been established that the right to revolution flows from the principle *ubi ius, ubi remedium* meaning that every wrong committed should be followed by a remedy. When the peaceful protests in Tunisia, Egypt, Libya, Syria and Ukraine were met with a violent crackdown by government authorities, meaning that peaceful means for resolving conflict were exhausted, the people invoked their right to revolution as a last remedy to protect their rights. The international community's actions evidencing the acceptance of the legitimacy of peoples' struggle but falling short of explicit references to revolution as a right and a corresponding obligation of the international community to vindicate it, and, thus, failing to fulfil the criteria of the traditional custom given the absence of the subjective element, can yet be qualified as creating a customary norm because they were in accordance with the equitable principle of *ubi ius ubi remedium*, which is also recognised as a general principle of international law.⁷²⁴

Second, the principle of good faith implies that states acting in a certain way with respect to particular events are expected to act similarly in similar circumstances in the future.⁷²⁵ Because a state that acts contrary to its previous undertakings, which placed reasonable confidence and faith with other states and other subjects of international law that such practice would endure, is acting without good faith and in contravention of international law. Following this line of argument, one can fairly suggest that states supported Ukrainian revolution and condemned regime's oppression against demonstrators because their actions in support of the Arab Spring revolutions created a certain level of expectations, known as reasonable or legitimate expectations, that such practice would continue. It means that *opinio juris* is characterised by a sense of obligation flowing not only from existing legal rules but also from the general principle of good faith and particularly from its core element — the principle of legitimate expectations, meaning that states must live up to their promises and undertakings giving rise to legitimate expectations that they will act in a particular way. Such understanding of *opinio juris* was partially accepted by the ILA, which centred its definition of custom on the latter's ability to raise legitimate expectations: a customary norm is 'one which is created and sustained by the constant and uniform practice of States and other subjects of international law in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of

⁷²⁴ See section 6.3.5.

⁷²⁵ *Nuclear Tests Case (Australia & New Zealand v France)* (Merits) [1974] ICJ Rep 457, para 46 (Claiming that an international obligation assumed by unilateral declaration is based on good faith. 'Thus interested states may take cognisance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected').

similar conduct in the future'.⁷²⁶ The ILA's definition also shows that not only actions of states can form custom but also those of non-state actors. This is increasingly supported by scholars. For example, Jordan Paust asserted that 'contrary to false myth perpetrated in the early twentieth century, the subjective element of customary international law [...] is to be gathered from patterns of generally shared legal expectations among humankind, not merely official State elites'.⁷²⁷ This view is also taken by Lepard and Hakimi, who argue that the practice of non-state actors may and should influence the evolution of customary law norms.⁷²⁸ Whilst these references to the impact of non-state actors mostly refer to the international institutions, such as, for example, the international courts and tribunals, the ICRC, the ILC and the UNGA, it is plausible to suggest that other entities, including revolutionary movements struggling against oppression, can have their share in the process of customary law making. Such position would solidify the status of revolution as a customary norm. Yet, this argument purchases its sweeping conclusion too cheaply as the concept of legitimate expectations is still 'in search of a doctrine'⁷²⁹ and involves complex debates on how to determine these expectations and on which criteria such determination should be based,⁷³⁰ which in the end of the day makes the concept too fuzzy for the delineation of *opinio juris*. Further, non-state actors do not possess essential characteristics of international personality to make their opinions count for the purpose of international law making. Even such more credible actors as international organisations are conventionally said to have, at best, a peripheral or subsidiary role in custom formation. They partake only to the extent that states delegate lawmaking authority to them or subsequently approve their actions.⁷³¹

Another concern relates to the fact that the above-elaborated *opinio juris-minimising* thesis seems to be at loggerheads with the state practice-minimising thesis of section 4.2.2 of this dissertation, which submits that constitutionalisation of international law entails the decreasing importance of state practice vis-à-vis *opinio juris*. According to this analysis, the right to

⁷²⁶ International Law Association, The London Statement of Principles Applicable to the Formation of General Customary International Law, Resolution 16/2000 (29 July 2000) section 1(i).

⁷²⁷ Jordan J Paust, *International Law as Law of the United States* (2nd edn, Carolina Academic Press 2003) 4.

⁷²⁸ Brian D Lepard, *Customary International Law: A New Theory with Practical Applications* (CUP 2010) 185-87; Monica Hakimi, 'Custom's Method and Process: Lessons from Humanitarian Law' in Curtis A Bradley (ed), *Custom's Future: International Law in a Changing World* (CUP 2016) 163ff.

⁷²⁹ Jason NE Varuhas, 'In Search of a Doctrine: Mapping the Law of Legitimate Expectations' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart 2017) ch 2.

⁷³⁰ *ibid* 22-23.

⁷³¹ Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37 *Yale J Int'l L* 107, 117-18; Monica Hakimi, 'Custom's Method and Process: Lessons from Humanitarian Law' in Curtis A Bradley (ed), *Custom's Future: International Law in a Changing World* (CUP 2016) 165.

democracy can be viewed as a customary norm irrespective of the scant state practice. Because both theses are justified within the framework of global constitutionalism, one may be legitimately suspicious of their seemingly inherent contradiction. Yet, what seems as a contradiction at first sight is in fact a great strength of the global constitutionalism thesis, according to which international law of the international community is in urgent need of adaptation to both scenarios, that is when the lack of state practice would impede the formation of a customary norm which is globally accepted and, on the other hand, when the lack of sufficient evidence of *opinio juris* would disqualify important state practice and thereby block the emergence of a customary norm.

All in all, the above analysis shows that under the traditional method of custom ascertainment the right to revolution does not qualify as an international customary norm. Albeit states have shown their endorsement of the revolutionary aspirations of the peoples against the oppressive regimes of the Arab Spring countries and Ukraine through a variety of responses, including sanctions against illegitimate regimes and recognition of rebel governments, at no point was such practice explicitly adjoined by a clearly articulated belief that the actions in issue were legally required. On the other hand, under the modern approach, such *opinio juris* can be identified if it resonates with ‘fundamental ethical principles’ and states believe that such norms are desirable now or in the nearest future; and if it entails a sense of obligation deriving from the principle of legitimate expectations. Yet, the ascertainment of states’ beliefs, including with respect to revolutions, is not an easy task, even though the general perception of the desirability of certain grass-root-level means of self-help against governmental abuse can be implied considering the general axiom of IHRL that for any human right violation there should be a remedy.⁷³² However, the most serious concern relates to the right to revolution’s possible disharmony vis-à-vis fundamental ethical principles. Indeed, it has been earlier elucidated that revolution rests on conflicting ethical grounds: whilst it is morally justified as the last resort against governmental abuse, it inevitably involves violence occasioning innocent death and damage to infrastructure; whilst it derives its roots from the fundamental principles of human dignity and equality, it may turn out to be destructive of human rights it claims to advance. Thus, to assert that revolution accords with fundamental ethical principles is to place the right of remedy over and above the value of human life. However, human rights scholarship does not acknowledge any hierarchy between human rights, albeit it is widely accepted that some rights are not absolute and may be limited (or derogated) in the interests of public order, national security and the rights of others. Whilst it has been previously established that it is theoretically possible to draw a parallel between IHRL’s regimes of limitations and derogations and revolution because they are roughly based on similar justifications, namely (re)establishment of the rule of law and

⁷³² See eg Universal Declaration of Human Rights, UNGA Res 217(III)A (10 December 1948) preamble; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 2(3)(a).

respect for human rights, such proposition is merely an academic construct and cannot be claimed to reflect state beliefs. Quite on the contrary, states continue to vigilantly defend their monopoly on the use of force and to view revolution as a threat to, and unwarranted interference with, their internal sovereignty.⁷³³ Another concern is the doctrine of legitimate expectations itself. Based on the vague notions of reasonableness and proportionality and characterised by a particular extent of reliance and detriment to be invoked, the concept of legitimate expectations is too abstract and subjective to aid in the determination of unequivocal *opinio juris*. All in all, it seems doubtful whether the right to revolution has acquired a status of an international customary norm within the modern approach paradigm.

This notwithstanding, it seems too hasty a conclusion to completely dispense with the idea of customary nature of the right to revolution, particularly considering international responses to such conceptually ambiguous events, as so-called ‘democratic coups’. At first blush, it seems incongruent to refer to the concept of coup at this conjunction, since it has been stubbornly professed throughout this work that the notions of revolution and military coup are conceptually different.⁷³⁴ To put shortly, whilst *coup d’état* is an affront to the peoples’ right to dispose of themselves (because it lacks popular support), revolution is the affirmation of this right; whereas *coup d’état* is a violation of democratic entitlement, revolution is a remedy for its realisation. Yet, the concept of the ‘democratic *coup d’état*’ does not fit neatly within this binary scheme. While, similarly to traditional military coups, democratic coup is perpetrated by the military officers against the governing (ostensibly authoritarian) regime, it is done so in response to popular opposition and with the latter’s support and whose main objective is not to rearrange state power along military’s political and economic self-interests (as is the case with conventional military coups) but to facilitate free and fair elections and to put national politics back onto the democratic track. As Varol in his influential article suggested, the democratic coup comprises the following attributes:

[T]he military coup is staged against an authoritarian or totalitarian regime; the military responds to popular opposition against that regime; the authoritarian or totalitarian leader refuses to step down in response to the popular opposition; coup is staged by a military that is highly respected within the nation, ordinarily because of mandatory conscription; the military executes the coup to overthrow the authoritarian or totalitarian regime; the

⁷³³ See eg Elizabeth Chadwick, *Self-Determination, Terrorism, and the International Humanitarian Law of Armed Conflict* (Martinus Nijhoff 1996) 9, 11; Elizabeth Chadwick, *Self-Determination in the Post-9/11 Era* (Routledge 2013) 23 (‘The very existence of Charter Article 2(7) communicates that governments should possess the means to quell domestic disruption and that consequential damage inflicted against a population will rarely be of concern to the wider community, unless it disrupts the wider peace’).

⁷³⁴ See section 6.1.

military facilitates free and fair elections within a short span or time; and the coup ends with the transfer of power to democratically elected leaders.⁷³⁵

It follows that the key attributes of the democratic coup, such as mass support and anti-authoritarian and democracy-promoting agenda, make it conceptually closer to the notion of revolution rather than that of a conventional *coup d'état*. To remind the reader, revolution is defined in this thesis as a mass uprising aimed at the unseating of the (repressive) ruling government along with the fundamental change of the institutional structure of the political system, pursued either by violent or peaceful means. Uprising is mass whenever it is characterised by popular dissatisfaction whether without direct involvement or with overt complicity or active support of the insurgents.⁷³⁶ It is clear from the definition that revolution's distinctive features are likewise mass character of the event and its anti-governmental orientation with the view of restructuring it. Yet, the establishment of the post-revolutionary democratic regime may or may not be the net outcome of revolution, even though in practical terms it is inevitable considering the clear anti-authoritarian agenda of the modern revolutions. Moreover, the definition shows that in order for an event to qualify as revolution it should be massively staged, whether directly or indirectly. Thus, whether revolution is led by masses or by individual actors on their behalf is immaterial, nor is it relevant whether the transition process is controlled by civilians or military leaders. Finally, the distinctive feature of revolution is that it seeks to bring about fundamental change of the institutional design of the political system. Military coups, on the other hand, typically occasion a mere cosmetic political restructuring of the polity to satisfy narrow and short-time objectives of the ruling clique. Yet, it has been recognised that '[s]ome coups, particularly those that qualify as revolutionary coups [that is when the masses support the coup], do bring about a radical overhaul of the political system'.⁷³⁷ Plainly, the 2011 political crisis in Egypt well illustrates

⁷³⁵ Ozan O Varol, 'The Democratic Coup d'État' (2012) 53 Harv ILJ 291, 295. See also Francis N Ikome, 'Good Coups and Bad Coups: The Limits of the African Union's Injunction on Unconstitutional Changes of Power in Africa' (2007) Institute for Global Dialogue Occasional Paper No 55, 14-15 <http://igd.org.za/jdownloads/Occasional%20Papers/igd_occasional_paper_55.pdf> accessed 14 March 2017 ('Good coups could be described as those that are informed by a genuine desire on the part of coup-plotters to resolve unsettling societal realities, particularly in relation to poor leadership and the hardships that it brings to the people — and against the backdrop of constrained political space for peaceful change. Coups are also seen as good when coup leaders are not only welcomed by the population and the broader international community upon taking power, but during their rule, meet the aspirations and needs of their peoples, while also keeping their word — in terms, for example, of eventually handing over power to democratically chosen civilian governments').

⁷³⁶ See section 6.1.

⁷³⁷ Francis N Ikome, 'Good Coups and Bad Coups: The Limits of the African Union's Injunction on Unconstitutional Changes of Power in Africa' (2007) Institute for Global Dialogue Occasional Paper No 55, 50, fn 12 <http://igd.org.za/jdownloads/Occasional%20Papers/igd_occasional_paper_55.pdf> accessed

the conceptual permeability between the notions of revolution and democratic military coup. Whilst the case in question is treated in this thesis as an example of the Egyptian Arab Spring revolution,⁷³⁸ it is equally designated by some scholars as the most paradigmatic affirmation of the soundness of the democratic military coup thesis.⁷³⁹ It follows that the phenomenon of the democratic military coup may fall under the definition of revolution, if it attracts mass support and seeks to implement broader political reforms, and therefore international responses to such events can provide additional instances of state practice relevant for the ascertainment of the customary nature of the right to revolution.⁷⁴⁰

One of the earliest examples is the 1992 Algerian coup, in which the military overthrew the results of the parliamentary elections whose winner was a radical Islamist party, the Islamic Salvation Front (FIS). When the party was founded in 1989, it made clear that it intended to remake Algeria into an Islamic state. Moreover, several FIS leaders expressed their hostility toward the institutions of multiparty democracy, including elections.⁷⁴¹ As a result, the international response was at least implicitly sympathetic to the coup, with some Western capitals endorsing the coup outright. For instance, *The New York Times* editorialised that Western governments, including President Bush and his administration, were ‘shamefully reluctant’ to criticise the coup.⁷⁴² It was widely affirmed that ‘[m]ost western governments made little secret of their relief’.⁷⁴³ France went further and explicitly endorsed the coup.⁷⁴⁴ Some of French political activists asserted that military coup ‘constitut[ed] Algeria’s

14 March 2017. See also Staffan Wiking, *Military Coups in Sub-Saharan Africa: How to Justify Illegal Assumptions of Power* (Scandinavian Institute of African Studies 1983) 10.

⁷³⁸ See section 6.6.1.2.

⁷³⁹ See Ozan O Varol, ‘The Democratic Coup d’État’ (2012) 53 Harv ILJ 291, 293 (Asserting that the 2011 Egyptian military coup ‘appears to break the traditional mold of military coups’); Kalkidan Obse, ‘The Arab Spring and the Question of Legality of Democratic Revolution in Theory and Practice: A Perspective Based on the African Union Normative Framework’ (2014) 27 LJIL 817, 819.

⁷⁴⁰ For criticisms, see Andrew C Janos, *The Seizure of Power: A Study of Force and Popular Consent* (Ctr Int’l Studies, Woodrow Wilson Sch Pub & Int’l Aff, Princeton University 1964) 36 (Arguing that a coup d’état ‘is the reversal of the process of revolution’); Richard Albert, ‘Democratic Revolutions’ (2011) <https://www.researchgate.net/publication/228284070_Democratic_Revolutions> accessed 8 March 2016 (Stating that ‘by definition, a coup cannot be democratic’ as it constitutes ‘an affront to the democratic ideals of stability, consent and legitimacy’).

⁷⁴¹ See generally Peter A Samuelson, ‘Pluralism Betrayed: The Battle between Secularism and Islam in Algeria’s Quest for Democracy’ (1995) 20 Yale J Int’l L 309.

⁷⁴² ‘Algeria: Democracy Betrayed’ *The New York Times* (14 January 1992) A22.

⁷⁴³ Peter A Samuelson, ‘Pluralism Betrayed: The Battle between Secularism and Islam in Algeria’s Quest for Democracy’ (1995) 20 Yale J Int’l L 309, 323. See also Mikulas Fabry, ‘The Right to Democracy in International Law: A Classical Liberal Reassessment’ (2009) 37 Millennium J Int’l Stud 721, 735 (‘When the Algerian military overthrew the results of the parliamentary elections in 1992, many Western capitals as well as some proponents of the democratic entitlement were greatly relieved since their winner was a radical Islamist party’).

⁷⁴⁴ Robert Zaretsky, ‘Egypt’s Algerian Moment’ *Foreign Policy* (20 August 2013) <<http://foreignpolicy.com/2013/08/20/egypts-algerian-moment/>> accessed 8 March 2017.

last chance of saving democracy and avoiding the fatality of fundamentalist totalitarianism'.⁷⁴⁵ Apart from rhetorical support, Western governments provided economic and financial support to the junta as well as welcomed Algeria in various international forums.⁷⁴⁶ Whilst the 1992 Algerian coup is not a pure case of democratic *coup d'état* since it did not involve popular grass-root mobilisation (conversely, there was a significant opposition within Algerian civil society) as well as its international support was by and large limited to Western powers, it represents an important precedent that certain coups are better than others.

Another example is the 2010 *coup d'état* in Niger. After ten years of authoritarian rule, Nigerian President Mamadou Tandja was deposed by a group of military officers calling themselves the *Conseil suprême de restauration de la démocratie* (CSRD) and announcing their intention to 'make Niger an example of democracy and good governance' and to 'save [the country] and its population from poverty, deception and corruption'.⁷⁴⁷ The coup attracted wide popular support, with thousands of protestors taking the streets in pro-coup demonstrations. The head of a prominent civil society coalition, Ali Idrissi, commented, '[d]eep down, we are cheering it. For us, it's a good coup d'état'.⁷⁴⁸ The support for the coup, albeit tacit, has also been expressed by the international community. The vast majority of states not only opted not to call for Tandja's reinstatement in office but also underlined the positive steps that the CSRD were taking. For instance, the US Deputy Assistant Secretary for African Affairs William Fitzgerald argued that '[the CSRD] seems to be saying the right things [...] we've seen some encouraging signs'.⁷⁴⁹ The possibility that some coups may be good was also considered by the Western media, with *Newsweek* asking, 'Is There Such Thing As a Good Coup?'.⁷⁵⁰

One could also recall the 2005 military putsch in Mauritania attracting mass support from the population. Whilst the coup was initially condemned by the AU — and only in principle since it was aware of the 'significant local

⁷⁴⁵ Alan Riding, 'France Voices Concern on Algerian Situation' *The New York Times* (14 January 1992) A7.

⁷⁴⁶ Peter A Samuelson, 'Pluralism Betrayed: The Battle between Secularism and Islam in Algeria's Quest for Democracy' (1995) 20 *Yale J Int'l L* 309, 324.

⁷⁴⁷ Alex Perry, 'A Coup in Niger Adds to West Africa's Instability' *Time* (19 February 2010) <<http://content.time.com/time/world/article/0,8599,1966681,00.html>> accessed 14 March 2017.

⁷⁴⁸ Hannah Armstrong, 'Niger Coup: Can Africa Use Military Power for Good?' *The Christian Science Monitor* (25 March 2010) <<http://www.csmonitor.com/World/Africa/2010/0325/Niger-coup-Can-Africa-use-military-power-for-good>> accessed 14 March 2017.

⁷⁴⁹ Anonymous, 'The Coup in Niger' *This Day* (3 March 2010) cited in Andrew C Miller, 'Debunking the Myth of the "Good" Coup d'État in Africa' (2011) 12 *ASQ* 45, 46.

⁷⁵⁰ Jason McLure, 'Is There Such Thing as a Good Coup?' *Newsweek* (19 February 2010) cited in Andrew C Miller, 'Debunking the Myth of the "Good" Coup d'État in Africa' (2011) 12 *ASQ* 45, 46.

support' and 'international sympathy' for the coup⁷⁵¹ — it was eventually legitimised following the presidential election, the winner of which was the author of that military coup General Mohamed Ould Abdoulaziz. Despite massive irregularities in the electoral process, Abdoulaziz's victory was confirmed by the international community, including the AU.⁷⁵²

The 2013 coup in Egypt also strongly exhibits key features of democratic *coup d'état*. By 30 June 2013, on the first anniversary of the election of President Morsi, millions of people rallied across Egypt calling for Morsi's resignation from office by appealing to what they considered to be his Islamist dictatorship.⁷⁵³ The numerical scale of the protests was claimed to be the largest in Egypt's history.⁷⁵⁴ Three days later, on 3 July 2013, Egyptian army chief General Abdel Fattah al-Sisi led a coalition to remove Morsi from power and suspended the Egyptian constitution. Morsi and other key members of the Muslim Brotherhood were arrested and put on trial, and the Chief Judge of the Supreme Constitutional Court Adly Mansour was appointed as interim president of Egypt.⁷⁵⁵ General al-Sisi called for new presidential elections, which he eventually won with 96,9% of the vote. Albeit international reactions were mixed, with some states condemning the military's actions and the AU suspending Egypt from the union, the majority of foreign leaders were generally supportive or neutral with regard to the Morsi's removal, refusing to call it a coup, some even designating it as a second revolution.⁷⁵⁶ Moreover, al-

⁷⁵¹ For a more detailed discussion, see Paul D Williams, 'From Non-Intervention to Non-Indifference: The Origin and Development of the African Union's Security Culture' (2007) 106 *Afr Aff* 252, 274.

⁷⁵² Issaka Souare, 'Mauritania: Auto-Legitimising Another Coup-Maker in Africa?' *ISS Today* (14 August 2009) <<https://issafrica.org/iss-today/mauritania-auto-legitimising-another-coup-maker-in-africa>> accessed 14 March 2017.

⁷⁵³ For a more detailed overview, see Hafez Ghanem, 'Egypt's Difficult Transition: Options for the International Community' in Hafez Ghanem (ed), *The Arab Spring Five Years Later: Case Studies* (Brookings Institution Press 2016) 24-28.

⁷⁵⁴ Shaimaa Fayed and Yasmine Saleh, 'Millions Flood Egypt's Streets to Demand Mursi Quit' *Reuters* (30 June 2013) <<https://www.reuters.com/article/us-egypt-protests-idUSBRE95Q0NO20130630>> accessed 4 August 2017.

⁷⁵⁵ 'President Morsi Overthrown in Egypt' *Aljazeera* (4 July 2013) <<http://www.aljazeera.com/news/middleeast/2013/07/20137319828176718.html>> accessed 4 August 2017.

⁷⁵⁶ Patrick Kingsley and Martin Chulov, 'Mohamed Morsi Ousted in Egypt's Second Revolution in Two Years' *The Guardian* (London, 3 July 2013) <<https://www.theguardian.com/world/2013/jul/03/mohamed-morsi-egypt-second-revolution>> accessed 4 August 2017; Max Fisher, 'Is What Happened in Egypt a Coup or a Revolution? It's Both' *Washington Post* (3 July 2013) <https://www.washingtonpost.com/news/worldviews/wp/2013/07/03/is-what-happened-in-egypt-a-coup-or-a-revolution-its-both/?utm_term=.f0aeled47672> accessed 4 August 2017; Matthias Sailer, 'Revolution in Egypt, Again' *Deutsche Welle* (Cairo, 4 July 2013) <<http://www.dw.com/en/revolution-in-egypt-again/a-16928333>> accessed 4 August 2017; Wael Nawara, 'Was Morsi's Ouster a Coup or New Egyptian Revolution?' *Al-Monitor* (4 July 2013) <<http://www.al-monitor.com/pulse/originals/2013/07/was-morsi-ouster-a-coup-or-new-egyptian-revolution.html>> accessed 4 August 2017; Todd Beamon and Kathleen Walter, 'Ahmed Said to Newsmax: Egyptian Uprising "Big Revolution"' *Newsmax* (5 July 2013)

Sisi's election was widely recognised internationally⁷⁵⁷ and up until today he is generally seen as the legitimate Egyptian head of state.⁷⁵⁸ Such rapid international recognition is particularly striking if one considers the fact that just some year ago similar recognition was accorded to President Morsi in the aftermath of the 2011 Egyptian Arab Spring revolution.⁷⁵⁹

Lastly, the 2014 coup in Thailand was likewise a response to mass mobilisations. When widespread demonstrations against the government of then prime minister Yingluck Shinawatra triggered turmoil, violence and public unrest, the military stepped in to take power. The coup was followed by scant international opprobrium. Neither the UNSC nor ASEAN offered explicit criticisms.⁷⁶⁰ Some Asian countries supported the coup-plotters by establishing bilateral relations with the junta government. For instance, Japanese Foreign Minister Fumio Kishida asserted that the Thai political system had to be decided by the people of Thailand. Similarly, India, the world's largest democracy, failed to address the Thai coup but focused instead on the maintenance of business-as-usual relations with Thailand. In the same vein as Japan, it viewed Thailand's democratic process as its internal matter.⁷⁶¹

The democratic coup thesis attracted wide scholarly support,⁷⁶² with some influential voices claiming that '[a]s long as there are tyrannical regimes, there

<<http://www.newsmax.com/Newsfront/ahmed-said-egypt-revolution/2013/07/05/id/513575/>> accessed 4 August 2017.

⁷⁵⁷ Tom Watkins, 'World Reacts to Egypt's Coup' *WDBJ7.com* (4 July 2013) <<https://web.archive.org/web/20131006103054/http://www.wdbj7.com/news/nation/World-reacts-to-Egypt-s-coup/-/20128494/20840874/-/item/0/-/7smnnw/-/index.html>> accessed 4 August 2017; David D Kirkpatrick, 'As Egyptians Grasp for Stability, Sisi Fortifies His Presidency' *The New York Times* (New York, 8 October 2014) A6.

⁷⁵⁸ Zaki Atia, 'Egypt's Military State and President al-Sisi's Declining Legitimacy' *Foreign Affairs Review* (18 April 2017) <<http://foreignaffairsreview.co.uk/2017/04/egypts-military-state-and-president-al-sisis-declining-legitimacy/>> accessed 4 August 2017.

⁷⁵⁹ See section 6.6.1.2 of this thesis.

⁷⁶⁰ See Oisín Tansey, 'The Fading of the Anti-Coup Norm' (2017) 28 *Journal of Democracy* 144, 145.

⁷⁶¹ See Maiko Ichihara and others, 'Asian Democracies and Thailand's Military Takeover' (*Carnegie Endowment for International Peace*, 13 October 2015) <<http://carnegieendowment.org/2015/10/13/asian-democracies-and-thailand-s-military-takeover-pub-61553>> accessed 14 March 2017.

⁷⁶² Francis N Ikome, 'Good Coups and Bad Coups: The Limits of the African Union's Injunction on Unconstitutional Changes of Power in Africa' (2007) *Institute for Global Dialogue Occasional Paper No 55* <http://igd.org.za/jdownloads/Occasional%20Papers/igd_occasional_paper_55.pdf> accessed 14 March 2017; Ozan O Varol, 'The Democratic Coup d'Etat' (2012) 53 *Harv ILJ* 291. For criticisms, see Pita O Agbese, 'Soldiers as Rulers: Military Performance' in George K Kieh and Pita O Agbese (eds), *The Military and Politics in Africa: From Engagement to Democratic and Constitutional Control* (Ashgate 2004) 85-86; John F Clark, 'The Decline of the African Military Coup' (2007) 18 *Journal of Democracy* 141, 141; Mathurin C Hounnikpo, *Guarding the Guardians: Civil-Military Relations and Democratic Governance in Africa* (Ashgate 2010) 106; Issaka K Souare, 'The African Union as a Norm Entrepreneur on Military Coups d'Etat in Africa (1952-2012): An Empirical Assessment' (2014) 52 *J Mod Afr Stud* 69, 82.

always be need for good people to be assisted or sponsor coups d'état'.⁷⁶³ Similarly, Oxford economist Paul Collier maintained that coups 'do not come cheap, but if they are the only way of removing a bad regime, then perhaps they are welcomed'.⁷⁶⁴ Based on this reasoning, he called for military involvements in Zimbabwe and elsewhere and urged the international community to accept those as legitimate.⁷⁶⁵ By the same token, N'Diaye asserted in the context of the 3 August 2005 Mauritanian putsch that it was the 'best opportunity to turn the page on decades of the deposed quasi-military regime's destructive politics' and that it was 'a model for political reform' in Arab North Africa.⁷⁶⁶ Likewise, Williams interrogated 'whether bloodless coups d'état that topple authoritarian regimes may advance the [African] Union's stated goal of democratisation'.⁷⁶⁷ That coups against authoritarian regimes are desired is also affirmed by some scholars criticising the AU unprincipled policy of condemnation of every military coup irrespective of its democratic credentials.⁷⁶⁸ It follows from the aforementioned that the overthrowing of abusive governments is a practice that is increasingly internationally tolerated and at times even specifically endorsed.

The question hence arises whether these examples provide sufficient evidence of state practice with respect to anti-constitutional means of democracy promotion and democracy defence, and whether the customary status of revolution can be effectively ascertained on the basis thereof. The complexity lies in the fact that albeit there is an undeniable conceptual affinity between revolution and democratic *coup d'état*, they differ in one crucial aspect, namely a *form* of mass support. It is clear that the very concept 'democratic *coup d'état*' derives its legitimacy from the fact that it is massively endorsed. Yet, unlike revolutions, which are staged by people *en masse*, democratic military coups are nonetheless *military* coups undertaken by a group of high-ranking members of the armed forces claiming to be acting in the name of people and democratisation. Not infrequently, such rhetoric is a mere disguise for personal power ambitions and new authoritarian blows. Furthermore, international support of both coups and revolutions seems to be

⁷⁶³ Michael J Waller, 'Valuable Political Technology: Review of Edward N Luttwak's *Coup d'État: A Practical Handbook*' (15 September 2004) 3 <<https://www.amazon.com/review/RZUD48E6X5H8O>> accessed 14 March 2017.

⁷⁶⁴ Paul Collier, *War, Guns, and Votes, Democracy in Dangerous Places* (HarperCollins Publishers 2009) 166.

⁷⁶⁵ Paul Collier, 'Let Us Now Praise Coups' *The Washington Post* (22 June 2008) <<http://www.washingtonpost.com/wp-dyn/content/article/2008/06/19/AR2008061901429.html>> accessed 14 March 2017.

⁷⁶⁶ Boubacar N'Diaye, 'To "Midwife" — and Abort — a Democracy: Mauritania's Transition from Military Rule, 2005-2008' (2008) 47 *J Mod Afr Stud* 129, 129-30.

⁷⁶⁷ Paul D Williams, 'From Non-Intervention to Non-Indifference: The Origin and Development of the African Union's Security Culture' (2007) 106 *Afr Aff* 252, 274.

⁷⁶⁸ See Eli Yemisi Omorogbe, 'A Club of Incumbents? The African Union and *Coups d'État*' (2011) 44 *Vand J Transnat'l L* 123, 153 (Arguing that in Niger, the PSC condemned the coup that might have advanced democracy: 'This is problematic when the incumbent displaced by the coup was undermining democratic institutions'); Bruce Whitehouse, 'The Force of Action: Legitimizing the Coup in Bamako, Mali' (2012) 47 *Africa Spectrum* 93, 95-96, 106-07.

predicated not so much on their democratic cause as on the community's distaste toward the overthrown regimes. All too often such aversion derives from the latter's unwillingness to cooperate and their potential threat to security rather than from their non-democratic character. Moreover, it is not clear whether international endorsement of military coups and revolutions actually represents *opinio juris* for the purpose of customary law formation, even if one accepts the changing nature of the former, because the right of violent resistance assumes an uneasy relationship with fundamental ethical principles, such as human life and dignity, and because the novel equitable approach to the identification of *opinio juris*, based on the principles of good faith and legitimate expectations, involves complex theoretical discussions as to the *opinio juris* precise determination. Ultimately, the above-enlisted cases of international support of revolutions and democratic coups are by and large exceptional, with state practice of condemnation of any anti-constitutional acts being more prominent. One should also note here the lack of consistency and double standards. A state which supports a self-determination claim of a revolutionary movement against another state would never accept such a claim against itself. As history reveals, no state that has actually faced a forceful resistance movement has recognised the authority of the movement to use force against it.⁷⁶⁹ All in all, albeit it is too premature to state that the right to revolution has *per se* crystallised into a customary norm, an unequivocal pattern of wide international support of people's struggles for democracy and human rights enables one to characterise the right as an emerging norm of customary international law.

6.6.4. Conclusion

The preceding sections have demonstrated that the complex theoretical construct of 'illegal but justifiable' revolution as a tool of democracy defence finds at least partial support in state practice. International responses to the democratically inspired revolutions in the Arab world and Ukraine in 2010-14, characterised by the collective delegitimation of authoritarian governments, introduction of sanctions against recalcitrant regimes, designation as legitimate of people's anti-government cause, provision of assistance to rebel groups, non-condemnation of revolutionary violence in defence of democracy, collective use of military force against repressive governments and international recognition of revolutionary governments, exhibit strong evidence of international endorsement of revolution as a measure of democracy promotion and democracy defence. The thesis further asserts that these actions combined with the international support of the democratic coups in Algeria, Niger, Mauritania, Egypt and Thailand speak for the elevation of the right to revolution to the level of a customary norm, albeit with a qualifier

⁷⁶⁹ See eg Noelle Higgins, *Regulating the Use of Force in Wars of National Liberation: The Need for a New Regime* (Martinus Nijhoff 2010) 83.

‘emerging’. Such peculiar status of the right to revolution in customary international law is occasioned by the fact that *opinio juris* underpinning state practice in support of revolution is somewhat deficient because it is predicated less on a sense of obligation that such practice is legally mandated and more on the moral concerns of unacceptability of state violence vis-à-vis its subjects, not to mention ever-present political stakes associated with such actions. Even though it is established that the modern approach to the identification of the subjective element of custom is constantly progressing towards one accommodating fundamental ethical principles, which reflect state beliefs about the desirability of custom (rather than about its actual existence), and one based on assumption that the existence of *opinio juris* can also be derived from the principle of legitimate expectations, it is concluded that the customary standing of the right to revolution cannot be effectively defended on the basis thereof. First, it is asserted that the right to revolution assumes uneasy relationship with fundamental ethical principles, such as the inherent value of human life. Second, the ascertainment of state beliefs with respect to the desirability of certain practice is even more problematic than with respect to the practice that is already required. Third, the principle of legitimate expectations has proven to be too vague and subjective to aid in the determination of *opinio juris*.

Another complexity animating the qualification of the right to revolution as customary has been shown to relate to the lack of sufficient conceptual affinity between revolutions and democratic coups. Whereas both concepts feature a number of crucial points of convergence, of which the most significant is involvement of a large portion of the population, the concept of democratic military coup is more controversial due to its proneness to abuse. Consequently, the value of the cases where military coups staged in response to mass popular demands of greater democratisation met positive international reactions is only of a limited significance when it comes to the ascertainment of the customary nature of the right to revolution. On top of that, it is accepted that prevalent political concerns behind state reactions to both revolutions and democratic coups, combined with the fact that the above-discussed cases of international support of anti-government force are rather exceptional, provide additional counterarguments against the right to revolution as a customary norm. It is concluded that the right to revolution has not yet crystallised into a full-fledged norm of customary international law. Rather, in view of wide international support of people’s struggles for democracy and human rights implicating such fundamental areas of international law as recognition of states and governments and state legitimacy, the right to revolution can be fairly characterised as an emerging customary norm.

It is also germane to note at this point that one should be warned against romanticising revolution as an alternative form of political participation,

however popular they are.⁷⁷⁰ The contemporary trend to uncritically define revolutions as legitimate (democratic) by simply looking at the number of people involved may seriously distort the picture, particularly if one takes into account the fact that million-man revolutions can be staged by opposing political factions where immediate economic gains rather than long-term democratic aspirations can play the principle role. Moreover, a fine line lies between the organised expression of the will of the people by means of a ballot and mob rule, or 'streetocracy', where the numbers of participating people is far less accurate. It follows that elections are the primary means by which the constitutive power of the people is expressed and should remain such. Only in the extremely rare cases when this mechanism of power transmission is defunct, can revolution be the only means to save democracy.

⁷⁷⁰ Kalkidan Obse, 'The Arab Spring and the Question of Legality of Democratic Revolution in Theory and Practice: A Perspective Based on the African Union Normative Framework' (2014) 27 LJIL 817, 835.

7. Conclusion

Since Thomas Franck's landmark article on the right to democratic governance as an emerging right, the literature on democracy and its role in international law has truly flourished. This is understandable giving the fact that there is hardly any area of international law immune from the imperative to promote democratic institutions as a *sine qua non* of the effective functioning of national orders and the international legal system as a whole. This imperative is born of the increasing globalisation of the international society, emergence of global values and the attendant growing sensitivity of individual states to global developments affecting their national security and economic wellbeing. To ensure a smooth functioning of the new order marked by elevated interaction, interdependence and value reception, new measures are constantly adopted by the international community to keep pace with the needs of the time, one of these being democracy promotion. Because democracy is commonly treated as a key to peace, stability, economic development and effective implementation of human rights, it goes without saying that it plays a progressively discernible role in international law. The overwhelming literature on democracy largely acknowledges this fact by referring to 'the emerging right to democratic governance', 'principle of democracy', 'principle of democratic teleology', 'customary obligation to conduct free and fair elections' and even 'das völkerrechtliche Demokratiegebot' [international democracy obligation].¹ Yet, such qualifiers fail to reflect the genuine role which democracy has assumed in international law and thus give a distorted picture of its legal standing. Moreover, the major works on democracy suffer from a lack of a clear methodological reflection on how the progressive democracy rhetoric is to be situated within the proper confines of the *de lege lata* legal discourse.

This work has been developed to respond to these shortcomings and to reconceptualise the international law of democracy. To this end, the underlying theoretical paradigm for international law has been reconsidered to conclude that international law is no longer anchored on classical liberal ideas of state sovereignty, domestic jurisdiction, state consent, non-intervention and territorial integrity — core principles of legal positivist thinking. Instead, it increasingly evidences value receptiveness and intolerance towards states representing a threat to common interest. Because the manner in which a state is internally organised and the extent to which it protects human rights and fundamental freedoms of its citizens manifest either the acceptance or the disapproval of global values, only states constituted along liberal democratic lines and respecting their human rights obligations are perceived as full members of the international community. This new theoretical paradigm has been designated as new liberalism and is grounded on an idea that the over-

¹ Frithjof Ehm, *Das völkerrechtliche Demokratiegebot* (Mohr Siebeck Tübingen 2013).

inclusive orientation of international law, where democracies and all sort of autocracies are equal on the international arena, is being substituted by a system in which status of states is defined by their degree of acceptance of certain individual rights, including the so-called 'right to democracy'.

It is acknowledged that even though new liberalism as a value-based conception of international law provides for the needed normative flexibility to ground a coherent problem-solving practice, it nonetheless entails uncertainty as to the objective nature of values it propagates. Such uncertainty involves an unavoidably subjective judgment over the content of these values with a view to secure power and control, all too often by means of differentiation and subjugation — a practice reminiscent of the nineteenth-century standard of civilisation. In this sense, the nineteenth-century division between 'civilised' and 'barbarian' is now claimed to be reinvigorated in the politics of liberal anti-pluralism, whereby states failing to meet neoliberal criteria of democracy, the rule of law and human rights are excluded from the international community of liberal states as outlaws or pariahs. Although it is accepted that there are commonalities between the classical standard and the so-called new standard, mostly manifested in the existence of a hierarchy between full-right members of the international community and members with a less legitimate status, these are compensated by divergences modifying the essence of the new standard. Unlike the particularistic and exclusionary nineteenth-century standard, the twenty-first-century standard strives for universality and inclusion. It is not imposed upon the international community but is spawned by the dynamics of contemporary international and national systems in search for common denominator. It is further asserted that at no point of human history has the international system been immune from values. Thus, the standard of civilisation exists as long as the community of states interacts in one way or another. It may take more or less exclusive stance, assume more or less explicit shape, but at no time is it wholly absent. It is concluded that international law should not be artificially stripped of any language of civilisation, because this is what legal argument is about — to balance between conflicting value visions, but that the new standard, by whatever name it is called, is as inclusive as possible to secure legitimacy and efficiency of the contemporary international order.

It has been further established that albeit there are multiple variations of new liberal thinking in international law, global constitutionalism represents the most sophisticated value-based conception when it comes to maintaining balance between law's normative and positive dimensions. In this sense, although global constitutionalism is anchored on a normative idea of a more just and efficient world order, it is largely a positive doctrine concerned with capturing, mapping and explicating actual transformations taking place in international relations. It is therefore a theoretical framework which sees constitutionalism as a description and explanation of how international legal and political order is changing. Considering the broad variety of academic traditions on global constitutionalism, the understanding of global constitutionalism as a legal approach and methodological perspective situated

within the broader theoretical framework of new liberalism adopted in this thesis has been asserted to square around social constitutionalism – an academic construction used by Schwöbel to describe a dimension of global constitutionalism that views the international sphere as an order of coexistence, which is more commonly known under the label of ‘the international community school’. Within this paradigm, international legal system has undergone a transformation from a sovereignty-centred system (international society) to a value-oriented system (international community), which rests on three fundamental pillars: democracy, human rights and the rule of law. It has been determined that not only do democratic credentials constitute the legitimacy base of states as members of the international community but also legitimacy of the international community rests on international constituency based upon domestic democratic participation. Apart from social constitutionalism as a leading theoretical paradigm within the variety of visions of global constitutionalism, it has been accepted that global constitutionalism is deeply intertwined with the domestic doctrine of political constitutionalism, characterised by the idea of legislative supremacy and the understanding of constitution as a continuous political process. On this account, because the international system lacks international constitution as a rigid framework of fundamental laws, international actors enjoy wide discretion as to how to go on political decisions but within ‘thin’ parameters set by global constitutional principles.

In addition, it has been identified that the empirically solid evidence of constitutionalisation in international law is obfuscated by theoretical uncertainties lying at the core of the constitutional argument. One of these is the assertion that global constitutionalism accommodates both naturalist and positivist savours because, on the one hand, it constitutes a set of normative standards binding on states irrespective of their will and, on the other, it is grounded in the considerations of predictability, legal stability and legality – constructions traditionally found in legal positivism. However, such hybrid quality of global constitutionalism seems to be at loggerheads with the famous disclaimer of critical legal studies that international argument cannot be both normative (utopian) and concrete (apologist) because the closer to state practice an argument is, the less normative it becomes and *vice versa*. It has been suggested that constitutionalism combines both utopian and apologist concerns without tapping into either thereof. It is not utopian to the extent that it is based on the consent of states, at least implicitly, to incorporate certain global concerns, which individual states are not capable to address on their own, into the fabric of international law. Neither is it apologetic for whenever constitutionalist values are couched in a legally binding form, they are not easy to change by whim and whimsy of individual states. The balance between the two opposing poles is maintained by an agent-relative (minimalist) understanding of the notion of ‘objectivity’ as a central element of the law’s normativity. Thus, ‘objective values’ derive from deliberation based on idealised circumstances of complete knowledge and rationality, rather than being merely based on deliberation in actual circumstances, are consented to

by the community of states and are embedded in the architecture of the international legal order.

Another theoretical difficulty animating the global constitutionalism discourse is its putative construction of international law as a narrative of progress. It has been acknowledged that because constitutionalisation of international law depicts the process of transition from a decentralised sovereignty-based system to a system with an elevated constitutional quality, it is automatically predicated on an idea of progress — the idea so much disfavoured by critical legal scholars. It is commonly accepted that the language of progress may give a hopelessly idealistic and simplistic depiction of the world, legitimise imperial politics and shift alternative narratives to the periphery. Yet, it is established that the narrative of progress is not only inevitable but also inalienable for any workable theory of international law seeking to provide for practical solutions to ever-emerging new legal problems. Global constitutionalism is grounded in progressivism. However, it has been shown that unlike mainstream scholarship, which attempts to conceal the progress narrative behind a veil of objective reasoning, constitutionalism puts the idea of progress at the very centre of its epistemology. Apart from transparency, legitimacy of such progressivism is enhanced by the latter's positive character, that is there are empirically established signs of constitutionalisation as a progress, not an imperial projection of a certain desirable future. Ultimately, global constitutionalism as a discourse of progress has been shown to be founded on assumptions that minimise abuse and exclusion. First, softening of international law as a layer of global constitutionalisation implies that more states than ever before can now participate in the process of international law-making because it is easier and less costly. Second, the revision of the doctrine of custom implies that more credence is given to universal *opinio juris* that certain norm is desirable and/or needed, rather than to individual instances of state practice of the most powerful states who possess political authority and economic resources to make their actions count. Third, because constitutionalisation of international law implies a shift of emphasis from individual state consent to universal consensus as the basis of an international legal obligation, sources that more easily accommodate common interest, such as general principles of law, assume prominence. Because such principles derive from a large number and variety of domestic legal systems, obligations they impose are more universal than those established by (multilateral) treaty or custom. It has been concluded that global constitutionalism is a 'law-in-context' approach by virtue of its pedigree (political science), methodology (theoretical rather than empirical), objectives (assumes a certain progressive stance vis-à-vis international order rather than simply preserves the state of affairs) and ultimate audience (broader academic community).

Before exploring anew legal foundations of democracy in the framework of global constitutionalism, it has been attempted to construct a novel definition of democracy. To this end, the thesis has sketched the main contours of the debate on the definition of democracy, which essentially revolves around

the discussions on theories and models of democracy. As to the former, political science distinguishes between three principal theories of democracy: classical theory, procedural theory and substantive theory. Whilst classical theory of democracy with its premium on government and individual rights is now rather a relic of the past, the debate is currently enduring between the adherents of procedural and substantive theories. Whereas procedural understanding equates democracy with the process of free, fair and periodic elections, substantive approach views democracy as an embodiment of a certain core of substantive values and practices, such as equality, empowerment and respect for human dignity. While the former is preoccupied with electoralism and can thus be easily hijacked by authoritarian regimes using elections as their legitimacy base, the latter lacks concrete conceptual frames to be workable.

Such indeterminacy within democratic theory is exacerbated by an uncertainty in the debate on the models of democracy: one-party democracy, associated with broad public sphere and built on the principle of 'government *for* the people', and liberal democracy, characterised by the existence of a broad private sphere and grounded in the principle of 'government *by* the people'. It has been established that even though it is commonly accepted that both models can undermine democracy if carried to extremes, it is liberal model which is recognised as the sole model compatible with international human rights standards. Yet, broad and at times contradictory theoretical underpinnings of the concept of liberal democracy, marked by the interplay of three broad intellectual traditions, such as liberalism, constitutionalism and democracy, as well as the emergence of alternative models of democracy using liberal model as a blueprint, hinder an emergence of a common definition of democracy even among adherents of the liberal model.

It is further established that treatment of democracy in international law largely mirrors the uncertainties and challenges faced by political scientists, albeit the procedural liberal conception seems to considerably dominate international legal debate, largely due to its measurability. It revolves around the question of elections and their compatibility with international human rights law. Within this framework, the thesis identifies several ways in which international legal scholars approached the question of democracy. Firstly, the entitlement to democracy is derived from already established list of human rights and fundamental freedoms, the most prominent being rights to elections and political participation, what has become to be known as the 'democratic entitlement school'. Secondly, democracy is tied to the existing fabric of international law by virtue of the principle of (internal) self-determination, whereby the realisation of self-determination can only be conceived in a democratic system. A third way to derive democracy from international law is to suggest that states are now customarily obliged to be democratic in terms of practicing free and fair elections, without such an obligation taking the form of a human right or embodying the internal aspect of the principle of self-determination. Lastly, democracy is argued to be neither a right nor a customary obligation to conduct elections but a mere teleological principle,

according to which states are obliged to gradually develop towards democracy and counter democratic regressions. The aforementioned approaches to democracy in international law are adjoined by less popular conceptions: an overtly optimistic one, enriching the definition of democracy with a set of substantive ingredients in line with substantive theory in political science, and an exceedingly pessimistic approach, resisting the international democratic parlance *tout court*. It is subsequently recognised that even though a procedural reading of the notion of democracy in international law is currently in the lead, it is criticised on many fronts, particularly because it ostensibly conceals and neglects the normative essence of democracy as a framework of empowerment and equality and thereby renders democracy toothless against manipulation by antidemocratic actors. Yet, viewing democracy through the prism of elections seems safer and more practical than delving into complex discussions of democracy's normative elements, such as respect for human rights and the rule of law, whose empirical ascertainment and measurement are close to impossible. It is therefore claimed that because the conventional election-centred conception of democracy is at loggerheads with the international law's changing attitude toward the character of government regime and the role of individual in the international system and because the substantive definition is too generic to lay down precise limits for the concept of democracy, a novel approach is needed.

The thesis has eventually developed a novel definition of democracy based on contemporary readings of the doctrines of liberalism and constitutionalism — two pillars of the global constitutionalism thesis. First, it has been postulated that liberal core of global constitutionalism derives from social-welfare liberalism, which implies that apart from securing freedom from arbitrary authority (negative freedom), liberal democratic states should also ensure proper conditions for exercising negative rights (positive freedom). Secondly, constitutional dimension of global constitutionalism pins on the notion of legitimate constitution — a constitution encompassing certain procedural and substantive characteristics which secure its role as a bulwark against the arbitrary exercise of power. Within this conceptual setting, a limited substantive conception of democracy has been suggested, which reads as follows: democracy is a system of government established through the process of periodic, free, fair and genuine elections based on universal suffrage in multiparty setting guaranteeing continuous political participation (by means of vote and other democratic institutions, such as referendums and civil society organisations) on conditions of equality and non-discrimination as well as protection of a certain core of socio-economic rights and operating on the basis of a legitimate constitution founded on the principles of checks and balances, divisions of power and the rule of law. This definition encompasses five central elements: electoral, liberal-constitutional, participatory, deliberative and egalitarian. On this account, democracy originates in elections but does not end there as it represents a series of rights, both procedural and substantive, that are mutually reinforcing. Democracy is not a mere means to reach power but is an end in itself because it ensures the realisation of the fundamental

capabilities of all members of society on conditions of equality and non-discrimination. The present definition, as runs the argument, does not solve all the complexities animating the concept of democracy. Yet, it overcomes major deficiencies of the previous definitions and conceptions of democracy and provides a flexible framework for accommodating local variations.

The thesis proceeds to map legal roots of democracy in the framework of global constitutionalism. Against the backdrop of global constitutionalism's overwhelmingly positive underpinnings, it is asserted that the twenty-first-century international law exhibits strong empirical evidence of its constitutionalisation by acknowledging 'non-consensual' elements within international law as forming an integral part of international legal obligation. These non-consensual elements now transcend every domain of (general) international law concerned with the emergence and ascertainment of legal norms, including treaty interpretation, formation of custom, the soft law doctrine and general principles of law. It is firstly established that the textual approach to treaty interpretation, that is in accordance with the ordinary meaning of the treaty text, is not sufficient in the context of human rights treaties, whose primary objective is the protection of the basic rights of individual human beings, not the ascertainment of the drafters' intent. It follows that the principal depositary of the right to democracy — article 25 ICCPR — is to be interpreted teleologically and evolutively because such approach to interpretation is implied by the nature of human rights treaties, is in accordance with the VCLT and is supported by international and regional practices. As to teleological interpretation, it is posited that even though the notion of object and purpose, whose identification lies at the core of the teleological approach to interpretation, remains an enigma, it is a common practice to look at preambles of treaties, treaty's overall text as well as subsequent state practice, including extraneous standards, as evidence of a treaty's object and purpose. Because the object and purpose of the ICCPR is the promotion of human dignity, equality, self-realisation and political empowerment, these can only be secured in a democratic polity guaranteeing a genuine plurality of political choices. This conclusion is reinforced by subsequent state practice through the venues of international and regional bodies supporting pro-democracy reading of article 25 ICCPR, including by the universal endorsement of the standard of free and fair elections, as well as by the holistic interpretation of other Covenant provisions, whose objects and purposes not only do not contradict the object and purpose of article 25 read along democratic lines but also rely on the democratic system for their realisation. The thesis concludes that teleological interpretation of article 25 ICCPR restricts the liberty of individual states to choose their form of government. This is applicable only to states parties to the Covenant, with signatories remaining unbound by the democratic requirement.

It has been further claimed that teleological interpretation implies evolutive reading of treaty terms, that is treaty provisions are to be interpreted in the context of modern developments, such as state practice, and against the background of general international law of the day. Particularly a treaty's

interpretation and application in view of its relationship with a wider normative system is an important precept of the evolutionary approach, what has become to be known as a theory of systemic integration. The thesis has established that the applicable general international law, constituting a broader normative environment affecting the interpretation of a treaty, is not only the law in force at the time the treaty was drafted but also at the time when the treaty is applied. Moreover, such general international law refers to all the existing sources of international law, including other treaties, custom, general principles and even soft law. It follows that regional human rights practices, such as a living instrument doctrine and the principle of commonly accepted standards, constitute a normative background against which the provisions of the ICCPR, including its article 25, are to be interpreted. Such interpretative practices, as the thesis has further submitted, are fully in accordance with the VCLT and represent the application of general international law's principles of systemic integration and internal coherence in the human rights context. Therefore, reading the Covenant, including its article 25, as a 'living instrument' and in the light of modern 'commonly accepted standards', such as, for example, the widely endorsed concepts of 'genuine elections' and 'free expression of the will of the electors', inevitably implies liberal democratic form of government. It has been eventually concluded that the net outcome of teleological and evolutive interpretation of the ICCPR is an international obligation imposed upon states by article 25 to introduce and maintain democratic form of governance.

Because the principle of systemic integration assumes that all sources of international law, including other treaties, custom, general principles and soft law instruments, must be taken into account in the interpretation of treaty provisions, this thesis submits that drawing support from other norms of international law in outlining and reinforcing legal underpinnings of the right to democracy is essential for the latter's normative robustness and legitimacy. That said, the second non-consensual element forming theoretical and legal base for the democratic entitlement is an evolving doctrine of custom. It is first established that whereas traditionally conceptualised state practice, characterised by the creation and operation of election monitoring missions, maintenance of membership conditionality in the statutes of a number of international organisations, establishment of democratic conditionality in development policies, adherence to democratic standards in state creation and recognition practices as well as adoption of forcible measures against non-democracies, seemingly lays down customary basis for the right to democracy, it is eventually recognised as falling short of being consistent and durable enough to result in the establishment of a customary norm of democracy.

The modern approach to custom evolved from judicial and practical experience in response to the rigidity of the traditional 'state practice plus *opinio juris*' approach. It is argued that a customary norm can emerge even in the absence of general and consistent state practice as long as *opinio juris*, that is a belief that a norm is legally mandated, can be effectively determined from other sources of evidence, e.g. verbal statements, and is in accordance with

internationally recognised constitutional principles. Regardless of resonant critique prevising that the modern approach is deficient on theoretical and formalistic grounds, this thesis argues that the process of the modern custom formation is not only a conscious, egalitarian and deliberate process based on universal participation of all state parties irrespective of economic wealth and political power but is also legally sound and supported by international judicial practice. It is therefore established that states' pro-democracy pronouncements on the international stage materialised in, inter alia, UNGA resolutions, resolutions of the former UN Human Rights Commission and its successor the Human Rights Council as well as general comments by the ICCPR Human Rights Committee, constitute a treasure house of international *opinio juris* regarding the legal standing and content of the democratic entitlement norm. Taken together, they provide a broad international consensus on the central procedural, institutional and substantive building blocks of democracy, such as the protection of the freedoms of association, assembly, expression, conscience and opinion, the right to political participation, the right to free and fair elections, respect for the rule of law, the separation of powers, the independence of the judiciary and political pluralism, based on full participation of all parties and ethnic groups. It is further asserted that the persistent objector rule cannot obliterate such international consensus because most states do not explicitly claim being non-democracies but instead defensively assert a special character of their democracies, which means that they fail to evidence their objection in a clear and consistent manner, and because by participating in the UN human rights regime states have already consented to the universality of human rights, including the right to democracy, and are thus estopped from raising objections. The thesis concludes that the right to democracy reflects customary international law.

A third domain of international law affected by global constitutionalisation, which has a direct bearing on the legal standing of the democratic entitlement, is the doctrine of sources itself. It has been established that the classical doctrine of sources, embodied in article 38 of the ICJ Statute, cannot serve as a rigid framework of reference for all the materials and forms of state practice that constitute today's avenues of law-creation and law-ascertainment, because it is anachronistic, theoretically controversial, incoherent and unable to capture the diversity of modern law-making practices. The framework of global constitutionalism provides a theoretical base and empirical justification for a more attenuated vision of the doctrine. It has been thus submitted that whereas article 38 of the ICJ Statute retains its place as the epicentre of law-ascertainment, it is not exhaustive and serves as a focal point for the incorporation of other manifestations of normativity, such as soft law.

Softening of international law, as the thesis has suggested, is a layer of global constitutionalisation because global constitutional principles find their most frequent and elaborate endorsement in non-binding instruments. As regards the right to democracy, non-binding instruments, such as non-treaty commitments by the international and regional organisations, provide for the most sophisticated account of democracy as a human right and a global value.

Particularly in Europe, Africa and the Americas, elaborated and deliberately norm creating non-treaty provisions on democracy reflect global understanding on constitutive elements of democracy going well beyond the procedural straitjacket. Whilst it has been eventually acknowledged that the right to democracy cannot be derived solely from non-treaty commitments, it has been nonetheless concluded that soft law instruments exert a strong impact on the conceptual scope of the democratic entitlement and constitute an essential stage of its legal evolution, not to mention the fact that soft law serves an important evidence of universal *opinio juris* and even state practice as well as constitutes the overall *legal* framework against which the treaty provisions on democracy are to be interpreted.

Ultimately, the fourth foundational field of international law constituting both engine and object of global constitutionalisation is that of general principles of law recognised by civilised nations. It has been conceded that a rare recourse to general principles as a full-standing legal source by the World Court and broader scholarly community is unjustified since akin to more conventional sources, such as treaty and custom, they are formal (they are explicitly mentioned in article 38(1)(c) of the ICJ Statute as sources which the Court shall apply in dispute resolution) and consensual (they are anchored in a large number of domestic legal systems). It has been further asserted that by virtue of their elasticity and abstractedness, on the one hand, and solid legal base, on the other, general principles are the ultimate mechanism of law creation capable of easily accommodating universal values without watering down the considerations of legality. This involves important legal implications for the democratic entitlement thesis. Because equity has been acknowledged as the most relevant sub-category of general principles recognised by civilised nations in the context of the present research due to its overwhelming acceptance in national legal orders and wide application by the World Court, such a sub-range of equitable principles as good faith, estoppel, acquiesce and substance over form have been recognised as laying down equitable foundations for the right to democracy. Since the primary aim of such principles is to ensure that a particular norm is applied justly, they provide an important justificatory base for the democratic entitlement as a right to just and fair political participation based on considerations of human dignity, equality, liberty and empowerment. Moreover, akin to soft law, general principles constitute general international law to be accounted for when interpreting treaty provisions. It has been therefore concluded that the right to democratic governance is now an international legal norm.

The democratic entitlement thesis has eventually been scrutinised in terms of its practical application to demonstrate that not only is it an academic construct, but it is actively enforced by the international community on the international and regional levels. It has been asserted that the most prominent feature of international and regional enforcement mechanisms is the collective response to unconstitutional changes of governments, such as military coups and executive coups, formalised through the adoption of international instruments containing so-called ‘democracy clauses’ – provisions envisaging

sanctions in response to democratic threats. The thesis has identified several systems for defending democracy by multilateral means: global system of the external defence of democracy and regional systems in Europe, the Americas, Africa and Asia. Global mechanism of the external response in defence of democracy has been said to derive from articles 30 UDHR and 5 ICCPR, prohibiting interpretation of the respective instruments in a way detrimental to any rights and freedoms set forth therein, as well as Chapter VII of the UN Charter, establishing a collective security mechanism to deal with threats to international peace and security, with democracy overthrows amounting to such threats. The latter mechanism has been asserted to play a key role in terms of robustness and efficacy of response to recalcitrant behaviour, including attacks on democracy. While it has been acknowledged that the collective action system to defend democracy is limited to cases when attacks against the democratic order are defined by the SC as threats to international peace and security, the effectiveness of the global mechanism is to be evaluated more broadly than by a sheer number of authorised interventions. These may include responses in the form of verbal condemnations expressed on the international arena, which are equally important for breeding the culture of intolerance to undemocratic politics and aid in the creation of *opinio juris* within the broader process of customary law formation.

At the European level, the system of external defence of democracy has been developed within the framework of three regional organisations: the CoE, the OSCE and the EU. The CoE's democracy clause is enshrined in article 8 of its Statute and the ECHR, whose articles 17 and 8-11 laid ground for the doctrine of 'militant democracy' as a tool to prevent nondemocratic actors from undermining democratic institutions. The OSCE laid down foundations for its own system of democracy protection in several key documents, such as the Copenhagen Document, the Charter of Paris, the Moscow Document and the Prague Document, which have had a significant impact on events in the region despite their non-treaty form. The EU, in its turn, codified the democracy clause in article 7 TEU, whose allegedly politicised nature is mitigated by the combined application of article 2 TEU, providing for values underpinning the EU, including democracy, and article 20 TFEU, incorporating EU citizenship rights, whose substance can be defined by reference to article 2 TEU values. Another EU's democracy-defending mechanism has been claimed to reside in articles 258-260 TFEU enabling the infringement proceedings for non-compliance with European law, including general and persistent violations, which is viewed as a middle ground between the Article 7 TEU procedure and the conventional individual-based application of article 258 TFEU. It has been conceded that whereas the high degree of institutionalisation and cross-organisational interplay have generated greater levels of commitment and compliance with democratic norms in Europe, the enforcement of democratic clauses across the three forums is far from uniform, stretching from the weak systems of oversight and strong reliance on state will of the CoE and the OSCE to the developed institutional framework of monitoring and enforcement within the EU, which is nevertheless

geographically limited to 28 states and whose overwhelmingly political and economic agenda all too often clouds democratic commitments.

The American collective system of defence of democracy, as the thesis has proceeded to opine, has been institutionalised through four important documents: the Santiago Commitment, Resolution 1080, the Protocol of Washington and the Inter-American Democratic Charter. The most exemplary feature of these instruments is the explicit prohibition of an unconstitutional interruption of the democratic order. The IADC has been recognised as the most paradigmatic inter-American instrument for promoting and enforcing democratic practices in the states of Hemisphere since it targets not only traditional democratic reversals, such as military coups, but also more sophisticated ways of usurpation of constitutional processes, namely executive coups. Yet, the exploitation of the full potential of the American mechanism of democracy defence is still hindered by the leading role of the principle of non-intervention enshrined in the OAS Charter, which led some American scholars to designate their regional system of collective action as 'intervention without intervening'.

It is further established that the African region developed one of the most robust systems of the collective defence of democracy. Its key instruments, the 2000 Lomé Declaration, the 2000 Constitutive Act of the AU and the 2007 African Charter on Democracy, Elections and Government incorporate the democracy clauses by prohibiting unconstitutional changes of government and envisaging a set of sanctions against coup-plotters, such as the suspension of the membership rights and the imposition of other punitive measures, including travel bans, visa restrictions and trade limitations. The thesis proceeds to submit that the African Democracy Charter contains so extensive provisions with respect to unconstitutional changes of government, up to the possibility of military intervention into a member state whose democratic order has been endangered by an unconstitutional usurpation, that the illegitimate usurpation of power in Africa is now to be considered a 'crime against democracy'. This notwithstanding, it is noted that the African collective mechanism of defence against democratic disruptions suffers from a lack of a principled approach in its anti-coup policy, whereby various gradations of legitimacy of toppled regimes and as well as the extent of democratisation of incumbent regimes should attract a more balanced consideration.

Ultimately, it is demonstrated that the vast region of Asia features the weakest commitment to democratic politics since most of the regional organisations in Asia have not adopted the democracy clause on the level of statutory law, with the politics of soft diplomacy, informality and discussion retaining a firm position. Yet, this thesis asserts that a gradual change from the policy of non-intervention to that of 'constructive engagement' with the issues relating to the internal regime of a state is traceable in the recent practice and statements by ASEAN, the Pacific Islands Forum and the Commonwealth. The three organisations did not only proclaim the validity of democratic principles in the Asian region but also showed their allegiance to democratic ideals in their practice of non-recognition of authoritarian regimes and sanctioning

recalcitrant governments by suspending their membership rights, albeit such practice remains largely ad hoc and confined to quite diplomacy and consensus. All in all, it is concluded that albeit the aforementioned mechanisms of external defence of democracy on the global scale and in regions vary significantly in scope, robustness and the extent of institutionalisation of the applied measures, stretching from the practice of stringent military defence of democracy in Africa to the Asian soft model of flexible engagement, they exemplify a remarkable consensus on one crucial point: once put in practice, the right to live in a democratically organised state shall not be abridged, and any attempts to do so will face international condemnation.

Because the external mechanisms of collective action in defence of democracy leave much space for improvements in view of their politicisation, inconsistencies, selectivity and regional peculiarities, it has been further suggested that ascertaining the legal framework for internal response to democratic transgressions is an inalienable constitutive part of the enforcement dimension of the right to democracy. Thus, the enforcement aspect of the democratic entitlement thesis, and hence to a certain degree its conceptual soundness, have been amplified by the development and conceptualisation of the notion of the internal mechanism of democracy defence and enforcement, namely the right to revolution. It has been asserted that the bottom-up mechanism of democracy defence by means of revolution is an *ultima ratio* tool to restore democracy and an ultimate remedy to effectuate the right to democratic governance. This mode of remedy is particularly acute on the face of the international community's inability to enforce international human rights.

The thesis has consequently discussed revolution's conceptual and philosophical foundations, whose detailed examination was considered to be specifically pertinent on the foot of revolution's ambiguous legal status. As to the conceptual framework of revolution, it has been claimed that revolution should be understood as a political phenomenon concerned with a change in the location of sovereignty. It is characterised by four key elements: violence, mass mobilisation, rapidity and impact. On this account, a revolution is a mass uprising aimed at the unseating of the (repressive) ruling government along with the fundamental change of the institutional structure of the political system, typically pursued by violent means and in disobedience to the laws of the implicated state. It has been further asserted that even though the notion of revolution is increasingly becoming elastic and 'transcendental', because it also depicts modern struggles by ever-broader strata of actors emancipated by the progressive human rights rhetoric, who seek only a limited change in policy within their respective governments, it is to be distinguished from other modes of resistance, such as civil disobedience and *coup d'état*.

It is subsequently submitted that apart from the established conceptual boundaries, the concept of revolution has deep intellectual roots transcending major legal traditions and geographical regions. It is asserted that the emergence and development of the right to revolution across the globe has a common feature, namely the idea that the right of resistance was coined as a

check against abusive state power. Its evaluative function of government performance was first based on certain external standard, such as God, nature and reason, and later on it was derived from the social underpinnings of the state itself, such as the social contract theory. The idea of revolution as a right remains alive up until today due to its codification in a wide array of constitutional documents across the globe. The thesis concludes that whereas the views of the world-renowned philosophers do not carry legal authority *per se*, as they used to do in the past, they provide an important evidence of the right to revolution's global pedigree and acceptance on the level of ideas.

This thesis eventually proceeds to discuss the complex legal status of the right to revolution. Albeit it is commonly posited that international law does not address the question of legal standing of revolution, the thesis illustrates that revolution has occasioned direct and long-term effects on the evolution and development of international law, the most pronounced of which is the establishment of the value code of international law through the promotion of such fundamental principles as human rights, self-determination, solidarity, equality and democratic legitimacy. Another way in which revolution enriched the architecture of international law is through the doctrine of revolutionary legality, according to which the legality of a revolutionary government is assessed through the prism of its efficacy. Yet, it is argued that much of what has been written on the topic so far is limited in context, nature and scope and the concept of revolution remains largely under-theorised. Moreover, the advancement of democracy as a human right and the corollary need to protect and restore it whenever it is in danger inevitably entails the investigation of the concept of revolution from a wholly new angle, that is as a last remedy against antidemocratic usurpers. Against this background, it is asserted that the legality of revolution (as a remedy) can be established on five grounds: revolution as a human right, revolution as a self-defence, revolution as a general principle of law, revolution as a legitimate belligerency and revolution as a legal remedy.

However, it is subsequently established that none of the aforementioned justifications secures the lawfulness of revolution on the level of first-order legal rules. First, it is accepted that while the international human rights framework provides for intellectual foundations for the right to revolution, it does not expressly recognise the right, nor does the right in question fit neatly into the human rights theory. Second, the legal validity of the notion of revolution as a right to resist grave and sustainable human rights violations committed by an oppressive government can be defended within the framework of personal (as opposed to interstate) self-defence, which can be claimed to be itself both a general principle of law and a customary norm transcending such foundational areas of international law as international criminal law, the law of state responsibility and the law of the use of force. Yet, because the notion of personal self-defence lacks a clear legal ground in international law, the constellation built on this scheme is fragile and open to contestation. Third, the right to revolution can be characterised in and of itself as a general principle of law recognised by civilised nations by virtue of its entrenchment in the texts of world's constitutions. However, it is eventually

admitted that since only the minority of constitutional provisions of domestic systems explicitly mention the right to resist by any means, with other constitutions merely implying the right or failing to acknowledge it at all, and there is no clear method of abstracting a general principle out of these provisions, not to mention the fact that such recognition would be at loggerheads with the fundamental precepts of constitutional thought, it is submitted that the right to revolution cannot be viewed as a general principle of law under this scheme. Fourth, another appropriate normative framework within which the legal base of the right to revolution can be established is IHL. It is posited that due to the evolving scope of the concept of self-determination, revolutionary struggles against oppression may amount to self-determination battles within the meaning of article 1 of Protocol I to the Geneva Conventions and can thus be equated to international armed conflicts, whose participants enjoy the highest degree of protection under IHL. Whilst it is consequently acknowledged that the provisions of humanitarian law on self-determination movements undoubtedly reinforce the international standing of revolutions as liberation struggles against oppressive regimes and thereby implicitly recognise their legitimacy, the relevance of the IHL framework for revolutions is rather meagre considering the fact that revolutions all too often either do not meet the threshold of a war or are deliberately characterised as such for the reasons of political convenience. Finally, it is asserted that the right to revolution as a remedy against human rights violations and government oppression springs from the principle *ubi ius, ubi remedium* – an equitable principle meaning that for every wrong committed there must be an adequate remedy. Even though the principle concerned was invoked by the PCIJ and the ICJ on numerous occasions and is hence recognised as being the most robust legal justification for the right to revolution, the content of the principle as well as precise modalities of its application are highly ambiguous, not to mention the fact that the World Court has never pronounced itself on the issue of the right to revolution as a remedy in its jurisprudence. Thus, it is concluded that the principle of *ubi ius, ubi remedium* does not secure the legality of the right to revolution on the level of first-tier legal norms.

In view of the aforementioned, this thesis proceeds to opine that the five enlisted normative frameworks within which the right to revolution can be justified do not uphold the legality of the right to revolution as a first-order legal norm. Instead, each of them appeals to the right's second-tier character, assuming that it is only to be activated in response to the violation of a first-tier legal norm and only as a measure of last resort. It is hence concluded that the right to revolution is at best a right *sui generis* because it does not stand for any objective value akin to a conventional catalogue of human rights but serves, instead, a subsidiary role of an exceptional remedy to fill a gap when traditional channels of legal action are not available or their effectiveness is considerably compromised.

Since the concept of a right *sui generis* has no clear doctrinal foundation, this thesis has proceeded to demystify this construction by reference to the formula of an 'illegal but justifiable' action as features in the post-Kosovo

practice of recognition of an action as illegal but legitimate if the latter adheres to a certain stratum of ethical constraints, mostly derived from the just war theory. The application of such formula to the notion of revolution with a view to clarifying the latter's extraordinary *sui generis* status is effectuated through the prism of the substantive conception of legitimacy, which is, in its turn, used as a nexus between the morally-laden framework of the just war theory and the law proper. To this end, the thesis proceeds to examine the notion of legitimacy in international law. It is accepted that whereas legitimacy is traditionally equated to legality, that is what is legitimate is what law requires and *vice versa* (procedural legitimacy), the modern legal discourse increasingly views legitimacy as assuming a dichotomous relationship with legality by appealing to such extra-legal standards as justice, fairness, morality and human rights – what has become to be known as substantive legitimacy. The global endorsement of substantive conception of legitimacy is most illustratively evidenced by the post-Kosovo adoption of the 'illegal but justifiable' approach as a tool to fill the gap between what legality requires and what morality demands. Even though the formula was conceived in the context of humanitarian intervention, its extrapolation to the notion of the right of revolution is claimed to be justified by the close moral proximity between the doctrines of humanitarian intervention and revolution as well as the broad international practice of resort to legitimacy arguments in situations where blind following of the letter of law would lead to unjust results. It is concluded that the concept of 'illegal but justifiable' revolution provides for the most adequate normative framework for accommodating the legally indeterminate construction of revolution as a *sui generis* right.

The thesis proceeds to submit that the concept of 'illegal but justifiable' revolution is tainted with uncertainties animating the qualifier 'justifiable'. This is well reflected in the contemporary 'terrorists v freedom fighters' dilemma, whereby what one views as terrorism (unjustifiable violence) another can view as freedom-fighting (justifiable violence). This means that there exists an inherent conceptual permeability between the notions of terrorism and revolution. Thus, the notion of 'illegal but justifiable' revolution does not only introduce a novel framework within which one could reimagine such distinction but its conceptual integrity in fact depends on the possibility to draw a clear line between terrorist and revolutionary violence. Otherwise the concept is, as the argument runs, useless. Whenever the issue of violence enters legal debate and the appropriate setting of first-order legal norms is deficient or non-existent, international practice shows that the recourse is typically made to the second-tier principles of the just war theory. The thesis thus sought to construct the notion of 'illegal but justifiable' revolution through a prism of the second-order ethical rules originating in the JWT by counterpoising legitimate (freedom-fighting) and illegitimate non-state use of armed force (terrorism). The notion of terrorism as the most acute constraining factor within any debate on the permissibility of non-state violence is hence taken as a contrasting example to facilitate the understanding of strengths and possible limits of the application of the just war criteria to the concept of revolution. Moreover, since

in international law the legitimate recourse to force by non-state actors is most commonly associated with freedom-fighting (or national liberation, to use the terminology of international law), the link between this and revolution is revisited to assert that not only is revolution conceptually close to the notion of freedom-fighting, but also the revolutionary cause of defending democracy and human rights has come to enlarge the concept of freedom-fighting due to the evolving nature of the principle of self-determination, which underpins both revolutionary and national liberation struggles. In this sense, because apart from battles against colonial domination, alien occupation and racist regimes, the concept of freedom-fighting has broadened to include other self-determination causes, including fights against systemic and systematic violations of human rights and government oppression, revolutionary struggles for democracy and human rights are claimed to constitute a modern variation of freedom-fighting.

The applicability of the principled framework of ethical constraints derived from the JWT as a normative setting for the notion of 'illegal but justifiable' revolution is defended on the ground of wide international practice of recourse to the second-tier principles of the JWT in situations involving non-state use of force, significant scholarly support, the fact that most of the JWT principles now constitute part of positive international law, both the laws of war and the laws of peace, and conceptual flexibility of the JWT rendering it responsive to modern types of conflicts waged by non-state actors as well as conflicts falling short of war. The thesis thus proceeds to delineate the notion of 'illegal but justified' revolution through a prism of the second-order rules originating in the JWT, such as legitimate cause, legitimate means, legitimate target and a set of legitimate conditions, including subsidiarity, legitimate authority and reasonable prospect of success. First, the legitimacy of cause is ascertained by reference to international legal principles of self-defence and self-determination, recognising the permissibility of non-state use of force in defence of human rights and democracy. Whenever non-state violence crosses the threshold of an armed conflict, IHL is an applicable framework, whereby the legitimacy of cause (achievement of national liberation as a means of the realisation of self-determination) is the ground for the full applicability of the laws of war. Second, the adherence to fundamental principles of IHL, such as proportionality, distinction and military necessity, in the time of war, and underlying principles of IHRL, such as proportionality, necessity, respect for non-derogable rights and peremptory norms, in the time of peace, signifies *a priori* legitimacy of means employed by non-state actors resorting to military force and thus distinguishes them from terrorists, provided that other criteria are met. Third, it is posited that whilst the goals of terrorists and freedom fighters may well be identical, they are distinguished from each other by the targets of their operations. In this sense, non-state violence against authoritarian states is more legitimate than against liberal democracies. Moreover, whereas terrorism primarily entails intentional targeting of civilians to produce shock and awe, revolutionaries only attack combatants or personnel and infrastructure that is directly responsible for the maintaining political

oppression. Finally, a set of legitimate conditions act as a sort of glue holding the three principal legitimacy criteria together. It is established that violence is more legitimate if applied as last resort, after all peaceful means to resolve the issue, including administrative, judicial and constitutional, have been exhausted (subsidiarity). Further, in order for non-state groups to be acknowledged as pursuing legitimate cause, they have to show that they represent the aspirations of the majority of population and act with their support (legitimate authority). Ultimately, it is pointed out that the requirement of reasonable prospect of success cannot serve as an effective criterion of legitimacy of political violence because force should be either overwhelming to secure the legitimate aims or should be avoided entirely, which does not reflect the realities of revolutionary struggles. Within this setting, it is concluded that revolution is 'illegal but justifiable' whenever it is undertaken in defence of human rights (legitimate cause), abides by the relevant norms of international law (legitimate means), targets representatives of oppressive regime (legitimate target), is exercised as a means of last resort (subsidiarity) and represents aspirations of the majority of population (legitimate authority). Albeit it is accepted that the aforementioned stratum of second-order ethical principles does not fully resolve the unusual *sui generis* status of the right to revolution and modalities of its exercise, it introduces additional avenues for debate over controversial conduct and provides a setting of more controlled criteria for the interpretation of first-tier legal rules with a view of adapting those to changing circumstances. It is concluded that to affirm exceptional legitimacy of political violence in furtherance of revolution is not only to generally recognise that the very existence of human rights plainly depends on the possibility of (violent) resistance in cases of their sustained and mass violations but also to accept the specific claim of this thesis, namely that revolution is an ultimate measure of democracy defence and thus constitutes the central element of the enforcement dimension of the democratic entitlement.

The complex theoretical construct of 'illegal but justifiable' revolution as a means of democracy enforcement is subsequently proven to find support in state practice. International condoning and endorsement of such democratically inspired revolutions of the twentieth-fifth century as the Arab Spring of 2010-12, including the most illustrative cases of Tunisia, Egypt, Libya and Syria, and the Ukrainian Euromaidan revolution of 2013-14 exhibit strong evidence of international support of revolution as a measure of democracy promotion and democracy defence. As the thesis has demonstrated, the international community undertook a variety of actions in response to these pro-democracy upheavals: undemocratic governments have been designated as 'illegitimate' with their leaders being called on to resign; sanctions have been introduced against governments refusing to cede to the demands of popular protests; the cause of anti-government resistance was internationally recognised as legitimate; rebel groups fighting for democracy were assisted by foreign states; the use of force by the protestors was not explicitly condemned by the international community; military force has been used against a

repressive government leading to a regime change and an instalment of a democratic government; and revolutionary governments have been recognised, albeit to different degree, by the international community despite the lack of all necessary credentials of political legitimacy. On the foot of the aforementioned instances of international practice, it has been argued that the international community implicitly accepted non-state violence in furtherance of revolution as a means to advance peoples' democratic aspirations.

The thesis further asserts that the above-enlisted instances of state practice coupled with the international endorsement of the democratic *coups d'état* in Algeria, Niger, Mauritania, Egypt and Thailand evidence the crystallisation of the right to revolution into a customary norm, albeit with a qualifier 'emerging'. Such peculiar standing of the right to revolution in customary international law is due to the fact that *opinio juris* underpinning state practice in support of revolution is somewhat deficient because it is grounded less on a sense of obligation that such practice is legally required and more on the moral concerns of unacceptability of state violence with respect to its subjects, not to mention the overall political background within which such international responses evolved and took shape. Even though it is established that the modern approach to the identification of the subjective element of custom is constantly progressing towards one accommodating fundamental ethical principles, which reflect state beliefs about the desirability of custom (rather than about its actual existence), and one based on assumption that the existence of *opinio juris* can also be derived from the principle of legitimate expectations, it is concluded that the customary status of the right to revolution cannot be effectively defended on the basis thereof. First, it is asserted that the right to revolution assumes uneasy relationship with fundamental ethical principles, such as the inherent value of human life. Second, the ascertainment of state beliefs with respect to the desirability of certain practice is even more problematic than with respect to the practice that is already required. Third, the principle of legitimate expectations has proven to be too vague and subjective to aid in the determination of *opinio juris*.

Another complexity animating the qualification of the right to revolution as customary has been shown to relate to the lack of sufficient conceptual affinity between revolutions and democratic coups. Whereas both concepts feature a number of crucial points of convergence, of which the most significant one is the involvement of a large portion of the population, the concept of democratic military coup is more controversial due to its proneness to abuse. Consequently, the value of the cases where military coups staged in response to mass popular demands of greater democratisation met positive international reactions is only of a limited significance when it comes to the ascertainment of the customary nature of the right to revolution. On top of that, it is accepted that prevalent political concerns behind state reactions to both revolutions and democratic coups, combined with the fact that the above-discussed cases of international support of anti-government force are rather exceptional, provide additional counterarguments against the right to revolution as a customary norm. It is concluded that the right to revolution has

not yet crystallised into a full-fledged norm of customary international law. Rather, in view of wide international support of people's struggles for democracy and human rights implicating such fundamental areas of international law as recognition of states and governments and state legitimacy, the right to revolution can fairly be characterised as an emerging customary norm.

All in all, this dissertation concludes that international law recognises the right to democracy and provides for the external and internal mechanisms of its defence and enforcement. For some this might sound as a revolutionary claim, but as Allott astutely observed, '[w]e are living in revolutionary times'.² These are times in which '[t]he internal and the external, the national and the international, are now completely flowing into each other'.³ This claim continues to be echoed today⁴ and constitutes the bedrock of the present work — the work that has taken a step forward to add shade and texture to the black and white discussions on democracy of the previous years.

² Philip Allott, 'Review Essay Symposium: Philip Allott's *Eunomia* and *The Health of Nations* — Thinking Another World: "This Cannot Be How the World Was Meant to Be"' (2005) 16 *EJIL* 255, 257.

³ Philip Allott, 'Roundtable — War, Force, and Revolution' (2006) 100 *ASIL Proc* 261, 263.

⁴ See Owen Taylor, 'Reclaiming Revolution' (2011) 22 *FYBIL* 259, 272; Jacqueline Rose, 'What More Could We Want of Ourselves!' (2011) 33 *London Rev of Books* 5, 5.

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Olena Sihvo

The Right to Democracy in the Age of Global Constitutionalism

This thesis sets out to resolve the puzzling standing of democracy in international law by developing a contextualised approach to democracy through the prism of global constitutionalism. On this account, because (empirically validated) constitutionalisation of international law entails the law's increasing autonomisation vis-à-vis states, non-consensual elements within international law, such as teleological and evolutive treaty interpretation, modern doctrine of custom, softening of international legal obligation, the increasing role of equitable general principles and the substantive legitimacy discourse, provide an important source of the democratic entitlement's legal underpinnings. The argument for the right to democracy is also bolstered from the standpoint of external and internal mechanisms for democracy defence, including international condemnation of military coups and other extra-constitutional changes of government and the international community's endorsement of peoples' bottom-up resistance by means of revolution as an *ultima ratio* tool to restore democracy and an ultimate remedy to effectuate the right to democratic governance. It is concluded that international law recognises the right to democratic governance and provides for the external and internal mechanisms for its defence and enforcement.